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CASES ON INTERNATIONAL LAW

VOL. I. PEACE

PITT COBBETT, M.A., D.C.L. (OXON)

*Formerly Eminent Professor of Law in the University
of Sydney, New South Wales*

SIXTH EDITION

BY

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PREFACE TO THE SIXTH EDITION

Pitt Cobbett's Cases is now too well known to require a detailed introduction.

First published as a single volume in 1885, it had grown in its third edition (the last prepared by its author) to a two-volume work. A fourth edition of the first volume, edited in 1922 by Dr. H. H. Bellot, kept strictly to the text and plan of the author. The fifth edition by Dr. Temple Grey appeared in 1931.

Pitt Cobbett's work has proved helpful to several generations of English students. As a casebook, however, its scope has always been very different from that of the admirable American casebooks of Hudson, Scott and Jaeger, and others. Those who desire law reports, not summaries of facts and decisions, must seek them elsewhere. Pitt Cobbett's work was designed as a "useful companion volume to existing textbooks", and such, despite the systematic notes to the third edition, which gave to it some of the characteristics of an outline textbook in itself, it has very largely remained.

Dr. Temple Grey in the fifth edition, seeking to emphasise the textbook side of its character, reversing the practice of previous editions, placed the comments of the author in larger type than the facts of the cases. In view, however, of the chief use which, I believe, is made of the book, I have preferred to return to the earlier form.

The passage of time has increased difficulties of selection of cases for inclusion in this edition. Lack of space has caused rejection of some cases which might otherwise well

have been included. In general, I have retained the cases selected by Pitt Cobbett where there seemed no reason for change other than the presence of more recent, though similar illustrations. Some twenty new cases have been added.

Pitt Cobbett, it has been truly remarked, relied almost entirely on English or American cases. Decisions of the courts of Continental Europe were not then available to the author in large numbers. In recent years the publication of the *Annual Digest of Public International Law Cases* (now edited by Professor Lauterpacht) has filled a gap and has rendered accessible a store of valuable information, which has been carefully examined. I have, however, not thought fit to include any decision from Continental Europe as an illustrative leading case, in a book of this compass, but have added a number of references to such decisions in my additions to the notes.

My task has been to revise the work of Pitt Cobbett, not to rewrite it. The present edition contains more alterations and additions than its last two predecessors. It remains, however, as in the past, primarily the work of its author, revised and brought up to date.

WYNDHAM LEGH WALKER.

FOSSSEDENE,
MOUNT PLEASANT,
CAMBRIDGE.

December, 1946.

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C A S E S

ON

INTERNATIONAL LAW

THE NATURE AND SOURCES OF INTERNATIONAL LAW

THE "PAQUETE HABANA" AND THE "LOLA"

(1899), 175 U. S. 677.

Soon after the outbreak of the Spanish-American War in 1898 two fishing-boats, the "Lola" and the "Paquete Habana", the one a schooner of about thirty-five tons with a crew of six, and the other a sloop of about twenty-five tons with a crew of three, sailing under the Spanish flag, were captured off the coast of Cuba by cruisers belonging to the United States force then engaged in the blockade of the north coast of Cuba, and were sent in for adjudication as prize. Both vessels were owned by a Spanish subject residing at Havana, and were manned by a Spanish crew; both had left Havana some time before on a fishing venture, which in the case of the "Paquete Habana" had been confined to territorial waters, but in the case of the "Lola" had extended beyond these limits; neither vessel had any arms or ammunition on board, and neither had any knowledge either of the blockade or even of the war, until captured; neither vessel made any attempt to violate the blockade or any resistance to capture, nor was there any evidence to show that either vessel or crew would have been likely to afford assistance to the enemy in war. There was no doubt that the ships were enemy property. But, it was said, these ships are fishing vessels, and by a rule of international law, they are exempt from capture. It fell therefore to the Court to decide whether the alleged rule was in fact accepted international law. and how it had become such. If it was so,

the Court had further to determine whether, though there was no express provision of United States law on the matter, it could accept and apply a rule of international law without further authorisation from the national law. In the Court below both vessels were condemned; but on appeal to the Supreme Court it was held that both captures were unlawful, and a decree of restitution was made.

[**Judgment.**] Mr. Justice Gray delivered the judgment of the majority of the Supreme Court (*a*). International law, he said, is a part of the law of the United States; and must be ascertained and administered by Courts of justice of appropriate jurisdiction, as often as any question of right depending on its duly presented itself for determination. For this purpose, where there was no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations (*b*), and as evidence of these to the works of jurists and commentators. Such works were resorted to by judicial tribunals, not for the speculations of those authors concerning what the law ought to be, but for trustworthy evidence of what the law really was (*c*). It was held that an examination of the text-writers clearly showed that there had been and still was a custom of exempting fishing-boats. It seemed, indeed, that English text-writers did not fully admit that this exemption had become a settled rule of international law; nevertheless both Hall and Lawrence stated that there was no difference between the practice of Great Britain in this respect and that of other countries, and that Great Britain had always been willing to spare fishing-boats so long as they were harmless.

By an ancient usage among civilised nations, beginning centuries ago and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fish, had been recognised as exempt from capture as prize of war. But as this doctrine had been contested at the bar, the judgment proceeded to trace the history of this

(*a*) A dissenting judgment on behalf of himself and two other members of the Court was delivered by Fuller, C.J.

(*b*) At p. 700; this statement being a quotation from the judgment in *Hilton v. Guyot*, 159 U. S. 113.

(*c*) P. 700; this also being a quotation from the judgment in *Hilton v. Guyot* (*supra*).

exemption. In doing this, reference was made to certain early treaties entered into between different European States; to various edicts and ordinances issued by European Governments; to a compilation on the "usage and customs of the sea"; and also to certain later treaties entered into by the United States; and the practice followed by the United States in previous wars; all of which went to show the existence of such a usage. There had, indeed, been an interruption of such usage as between Great Britain and France during the wars of the French Revolution; but that this interruption had been only temporary appeared from the fact that the exemption of fishing-boats had been renewed by Orders in Council of 1806 and 1810. Since then no instance was found in which the exemption from capture of private coast fishing vessels honestly pursuing their peaceful calling had been denied by Great Britain or by any other nation; whilst the Empire of Japan, the last State admitted into the ranks of civilised nations, had, at the beginning of the war with China in 1894, by ordinance exempted "all boats engaged in coast fisheries" (d).

Looking, then, at the matter both in the light of precedent and authority, it appeared to the majority of the Court abundantly clear that, at the present day, according to the general consent of the civilised nations of the world, and independently of any express treaty or other public Act, it was an established rule of international law, founded on considerations both of humanity to a poor and industrious class of men, and of the natural convenience of belligerent States, that coast fishing vessels, with their implements, supplies, cargoes, and crews, unarmed and honestly pursuing their peaceful calling, should be exempt from capture as prize of war. But this would not extend to a case in which such vessels were in addition employed for any war-like purpose; or to the case of vessels fishing on the high seas, taking fish, such as whales or cod, which were not brought fresh to market; or to a case where seizure was required by military necessity.

Finally, it was held that this rule, being a rule of international law, was one which Prize Courts administering the law of nations were bound to take judicial notice of and to give

effect to, in the absence of any treaty or public Act of their own Government in relation to the matter (e).

The problem before the Supreme Court of the United States in this case was whether a rule exempting fishing boats from capture was part of the law of the United States. In the internal legislation of that country it was not possible to find that the existence of any such rule had been recognised. It was alleged, therefore, that the rule in question was the rule of a law called international law which the Prize Courts of the United States were bound to apply, without any special authorisation from internal legislation. This view was accepted by the Court. This case embodies a judicial recognition, on the part of one of the most august tribunals, of certain fundamental facts and principles in relation to the nature and sources of international law. These are: (1) that international law is a body of living rules, resting on the general assent of civilised nations (f); (2) that such assent finds its expression for the most part in usage, which when sufficiently general gives rise to rules of custom; and (3) that for proof of such usage regard must be had to the records of the actual practice of States, as well as to the works of accredited writers on international law in so far as these purport to show the approved usage of nations. The statement of Mr. Justice Gray that international law is part of the law of the U.S.A. has been frequently cited and approved. It is, however, subject to some qualifications (g).

The Nature and Sources of International Law.—International law may be described as “the sum of the rules accepted by civilised States as determining their conduct towards each other, and towards each other’s subjects” (h). This body of rules, which rests on the common assent of civilised communities (i), has its origin in the common needs of international life and intercourse. States, like individuals, cannot live side by side with each other without evolving rules of conduct by which,

(e) Cf. also *Reg. v. Keyn*, 2 Ex. D. 63; *The West Rand Central G. M. Co. v. R.*, [1905] 2 K. B. 391; *Hilton v. Guyot*, 159 U. S. 113; *The Scotia*, 14 Wall. 170; and Scott and Jaeger, pp. 21–33.

(f) Cf. *Re Piracy Jure Gentium*, [1934] A. C. 586, per Sankey, L.C.

(g) See *Schroeder v. Bussell (The Over the Top)* Hackworth, Digest I, 26; and *Skirnotes v. Florida*, Annual Digest of Public International Law Cases, 1941–2, No. 68, in which the Supreme Court held that a citizen of Florida could not invoke a rule of international law as to the three mile limit against a law of his own State.

(h) This definition, save for its concluding words, is virtually that put forward by Lord Russell of Killowen in 1896, which was judicially adopted in the *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B., at p. 407; cf. also *R. v. Keyn*, 2 Ex. D. at 154.

(i) *West Rand Central G. M. Co. v. R.*, [1905] 2 K. B. 391; *The Scotia*, 14 Wall. 170.

in their common interest, friction and conflict may be avoided. Such rules are at once essential to the intercourse of States and the tranquillity of the world. But whilst international law, as a body of rules, may be said to have its origin in the common needs and mutual conveniences of the civilised part of mankind, its immediate sources, in the sense of the *modes* or agencies by which its rules are formulated (*j*) or brought into being, may be said to be (1) Usage, which when sufficiently general gives rise to custom; and (2) Positive agreement; each being a manifestation of that general assent which must necessarily constitute the basis of any law applicable between States that have no common superior. So, in the *West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B., at p. 407, it was said that in order to prove an alleged rule of international law it must be shown "either to have received the express sanction of international agreement", or "it must have grown to be part of international law by the frequent practical recognition of States, in their dealings with each other" (*k*).

Usage and Custom.—Usage means no more than habitual practice. The growth of usage and its development into custom may be likened to the formation of a path across a common. At first each wayfarer pursues his own course; gradually, by reason either of its directness or on some other ground of apparent utility, some particular route is followed by the majority; this route next assumes the character of a track, discernible but not as yet well defined, from which deviation, however, now becomes more rare; whilst in its final stage the route assumes the shape of a well-defined path, habitually followed by all who pass that way. And yet it would be difficult to point out at what precise moment this route acquired the character of an acknowledged path. The growth of usage and formation of custom, both as between a community of individuals and the community of nations, proceeds much on the same lines. As between nations some particular practice or course of conduct arises, attributable in the first instance to some particular emergency or prompted by a common belief in its convenience or safety. But its observance is discretionary; and it exists side by side with other competing practices. Next, as between competing usages the fittest, having regard to the needs of the time, generally tends to prevail. It gathers strength by observance. It comes to be recorded, and is appealed to in cases of dispute, although not infrequently violated. Finally, it comes to command a general assent; and at this stage it may be said to take on the character of a custom, which involves not merely a habit of action, but a rule of conduct resting on general approval. The process by which usage thus crystallises into custom is well illustrated by the growth of the law affecting belligerent and neutral States, so admirably sketched by Hall (*l*). But the conditions of international life are constantly changing; and

(*j*) Cf. Holland, *Jurisprudence*, p. 55 (13th ed.).

(*k*) See also *R. v. Keyn*, 2 Ex. D. 63.

(*l*) Hall, Part IV, Chap. II.

new conditions ever tend to generate new usages, some of which in their turn develop into customs, that modify or supersede those hitherto observed. Within each political society and as between the individual members of the community the difficulty of ascertaining custom is met by the gradual establishment of some form of political authority which, through its various organs, assumes at once to declare what customs are binding and also to enforce them on its individual members. Out of this grows the national law. The two great difficulties with respect to custom are (1) the difficulty of proof and (2) the difficulty of determining at what stage custom can be said to become authoritative.

Evidence of Custom.—It is difficult to classify logically the different sources of evidence as regards custom. But in substance we may say that custom may be proved either (1) by reference to instruments and records showing the practice of States, or (2) by reference to the writings of the publicists, as tending to show what is the general opinion with respect to international conduct, or (3) by reference to the decisions of international tribunals, Courts of Prize, or even the higher Courts of a State when purporting to adjudicate on matters coming before them according to the principles of international law. The subject of international tribunals will be considered hereafter (*m*).

(1) *Records of State Action*.—It will be seen from the judgment in the case of the *Paquete Habana* that the Court, in endeavouring to ascertain whether there was a custom of exemption as regards fishing-boats took into consideration both treaties made between different States—edicts and ordinances issued by particular States—and also compilations of maritime usage. But anything that tends to show the fact of usage, and that such usage is general, will be available as evidence. So in *R v Keyn* it was said: "Whether a particular usage has or has not been agreed to must be a matter of evidence. Treaties and acts of State are but evidence, and do not, in this country at least, *per se* bind the tribunals. Neither, certainly, does a consensus of jurists, but it is evidence of the agreement of nations" (*n*). The records of State practice usually referred to comprise (1) limited compacts or treaties between particular States, (2) decrees and ordinances issued by particular States, (3) instructions issued by States prescribing rules of conduct for their agents in matters of international concern, (4) written opinions of official jurists given, in relation to such matters, to their own Governments; (5) diplomatic correspondence between particular States, (6) the decisions of Prize Courts, and even of other municipal Courts in so far as they deal with matters of international concern, and (7) the history both of international transactions and of the executive action of particular States in relation to questions of international right. With respect to

(*m*) P 384 *infra*

(*n*) 2 Ex. D. 63, *per* Lord Coleridge, C.J., at p. 154, and *West Rand Central G. M. Co. v. R.*, [1905] 2 K. B., at p. 407.

treaties, it will be noticed that these are here referred to only as evidence of usage. Many treaties have nothing to do with international law. Moreover, even when treaties entered into between particular States purport to define or modify the existing rules of international conduct in relation to those States, such agreements, although they may create a kind of particular international law, cannot strictly affect the obligations of the parties in relation to other States, or modify the general law. Nevertheless, even if we leave out of consideration for the moment the great law-making treaties referred to hereafter, treaties made between particular States may furnish evidence of custom in two ways: (1) In the first place, they may expressly purport to declare the general law, which the parties conceive to be binding not only on them but on all civilised States. So by a protocol signed at the Conference of London, 1871, the representatives of the six Great Powers, and also of Turkey, declared it to be an essential principle of the law of nations that "no Power can release itself from the engagement of treaties except with the consent of the contracting parties amicably obtained" (o). (2) In the second place, it often happens that a treaty made between particular States, defining or modifying some rule of international conduct, is followed by similar treaties between other States; with the result that a new usage is gradually formed, which when sufficiently general will become binding irrespective of treaty. Treaties, in fact, which begin by excluding or modifying existing customs, may in time lay the foundation of new custom (p).

(2) *Text-writers of Authority*.—The Court, in the *Paquete Habana*, after examining the question of custom in the light of the evidence afforded by national practice, proceeded to consider it in the light of the authority of the jurists and commentators. "No civilised nation", says Kent, "that does not arrogantly set all law and justice at defiance will venture to disregard the uniform sense of the established writers on international law" (q). Nevertheless, as was pointed out in the judgment, such works are resorted to not for the speculations of the authors as to what the law ought to be, but for trustworthy evidence of what the law really is. The authority of the text-writers, in fact, rests partly on the ground that they furnish evidence as to what is the approved usage of nations, and as to the prevalent opinion with respect to rules of international conduct; but even more on the ground that by recording such usages and stating the reasons on which they purport to be based, the text-writers lend them form and shape as rules, and thereby enable them to be appealed to in cases of international dispute. The weight, however, that attaches to the writings of the publicists differs greatly in different countries. In some

(o) This may well serve as an example; although in relation to the immediate cause of dispute the declaration was little more than formal.

(p) Hall, pp. 11 and 12; and as to the "evidences of custom in international law", Westlake, i. 16.

(q) Kent, Com. i. 12th ed. p. 19.

countries, especially in those which have inherited the system of Roman law, the tendency is to regard the opinions of approved writers not merely as persuasive, but as authoritative. With the English lawyer the tendency is to regard them only as evidence, and not always very weighty evidence, as to the usage of nations. This view finds its most definite expression in the judgment of Cockburn, C.J., in the case of *R. v. Keyn*, 2 Ex. D., at p. 202 (r). Nevertheless, as was pointed out in the same case by Lord Coleridge, the unanimous testimony of writers on international law, extending over a long period of time, may often serve to establish almost conclusively the existence of usage and common agreement amongst nations; and a similar view was adopted by the Supreme Court in the *Paquete Habana*. In *Macartney v. Garbutt*, 24 Q. B. D., at p. 369, Matthew, J., in giving judgment on the question of the exemption of a subject who had been received without reservation as a member of an embassy from a foreign Government, relied solely on the views put forward by accredited writers. Even more important, perhaps, is the influence which they exert in giving shape and form to legal rules, and in directing international opinion. Thus, as regards international law, it was admitted in *West Rand Central Gold Mining Co. v. R.* (s), that "the views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilised nations is enlarged". As regards that part of English law, moreover, which is commonly known as "private international law", it has been justly said that Story's "Conflict of Laws", which appeared in 1834, had the effect of systematising or even creating a whole branch of English law; whilst Mr. Westlake's "Private International Law", which appeared in 1858, has influenced the whole line of cases decided by the English Courts during the last half-century.

When does Usage become Authoritative?—Some parts of international law rest on usage which is universally accepted amongst civilised States; such is the case with respect to the general immunity of ambassadors. But the changing conditions of international life are ever generating new usage, and it is as to these inchoate customs that the difficulty arises of determining at what stage usage or common practice can be said to have developed into custom or common law. Although international law as a coherent body of rules is rightly said to rest on the common assent of civilised nations, it can scarcely be said that every new usage must, before it can be recognised as part of the customary law of nations, have been definitely accepted by every member of the "family of nations". The test usually adopted in order to ascertain whether usage has developed into obligatory custom is, that it must be approved by the *common consent* of civilised nations (t) or

(r) See also *West Rand Central G. M. Co. v. R.*, [1905] 2 K. B. at p. 401.

(s) [1905] 2 K. B., per Lord Alverstone, C.J., at p. 402.

(t) See *The Scotia*, 14 Wall. 170.

the general consensus of opinion within the limits of European civilisation (u). The difficulty lies in the application of this test. Something will turn on the question of the long continuance of the usage, but even more on the number of States adopting it; in fact, "unanimous opinion of recent growth will constitute a better foundation than the long practice of particular States" (x). If, then, the usage in question has become the predominant usage, and if, in fact, it prevails amongst the great majority of States, it may fairly be regarded as part of international law, even though an exceptional practice may still be followed by a few States, especially if these be of minor importance. It should be noticed, however, that special authority attaches to the usages of particular States in certain departments; so that no new maritime usage could well be regarded as generally binding, independently of agreement, unless it had been followed by such Powers as Great Britain and the United States.

Intrinsic Reasonableness and Conformity with Principle.—Finally, just as considerations of justice and humanity, of public convenience, and "the reason of the thing" enter into both the making and interpretation of the unwritten law of England, so it may be said that considerations of morality, of conformity to existing principles, and of intrinsic reasonableness, will not only be taken count of in the interpretation and application of admitted rules of international law, but will also in cases of doubt constitute an important factor in determining the obligatory character of international custom (a). Reason, or the general principles of law, is recognised by some jurists as forming a source of international law distinct from the express consent through international agreement or that form of tacit consent resulting in the acceptance of custom. So, also, in determining the nature and scope of an alleged custom some regard may fairly be had to considerations of comity, and reciprocal convenience as between States; although this can only be regarded as a secondary factor (b).

International Agreement.—In modern times express international agreement has assumed an increasingly important place both in framing general rules of conduct and in the settlement of territorial and other matters affecting the peace of nations. Such international agreements may fairly be grouped under three heads: (1) Law-making treaties (c); (2) Territorial settlements and kindred arrangements; and (3) Agreements providing for mutual co-operation in furtherance of intercourse and in other matters of common concern. It is strictly

(u) Westlake, i. 16.

(x) Hall, at p. 12 *et seq.*

(a) As to "the reason of the thing" see *The Charkieh*, 4 A. & E., at p. 77; *Bentzon v. Boyle*, 9 Cranch. 191; *Phillimore*, i. 29, iii. 105; and Westlake, i. 14, 15, 17. As to "general principles of law as a source": Oppenheim, i. 26 (5th ed.).

(b) As to the distinction between custom and comity, see Hall, *Foreign Jurisdiction*, p. 6 n. As to comity, see also Oppenheim, i. 31.

(c) This appropriate term is suggested by Oppenheim, i. 26.

only the first of the groups that affects the question of the making or alteration of rules of conduct; but the others bear so closely on the organisation of international society that they claim some mention.

(1) *International Law-making*.—International agreement, as a factor in the making of new rules of conduct, may take the form of either treaty or convention, or joint international declaration. With respect to treaties, these even where they do purport to introduce new rules of international conduct, will, if made only between particular States, strictly only be binding on the signatory Powers; and they will not affect the general law, except in so far as they may afford evidence of the formation of new custom. But this is a slow process; and in view of the fast-changing conditions of international life, the inadequacy and indefiniteness of existing rules, and the inconvenience and danger of international friction or conflict involved while waiting until new rules have been generated by custom, it has been attempted in modern times to settle the rules of international conduct by the concerted action and declaration of a group of leading States, or, more recently, of the great body of civilised States.

It is true that these agreements are, in strictness, only binding on such Powers as may adopt them. Even such conventions as the Geneva Convention, 1906, and the various conventions framed by The Hague Conference, 1907, are merely facultative or optional—are only binding on and as between signatory Powers—and are commonly subject also to a right of withdrawal (*d*). In this respect it may be said that these so-called "law-making treaties" do not differ materially, as a factor in international law, from ordinary treaties made between particular States; which, as we have seen, do not affect the general law, except in so far as they may, by constant repetition, lay the foundation of new usage. Nevertheless, there is a great difference in effect. The law-making treaties really represent the deliberate judgment of the leading States—or more recently of the great body of civilised States—as to what rules ought to be observed in certain international relations. There is, moreover, amongst nations, as amongst individuals, a deep-seated tendency to imitate conduct approved or followed by any powerful or predominant section of their neighbours. Hence it has been found, so far, that rules originating thus tend to command more readily the express assent of other States, and so to pass at once into the treaty law of nations, instead of having to await the slower process of incorporation into international custom.

(2) *International Settlements*.—There is also another class of international agreements, which may be said to affect not so much the rules as the *subjects* of international law. Such arrangements are primarily political, in so far as they purport to define the status or territory of particular States, or to regulate the use of international waterways,

(*d*) It is worthy of notice that the Declaration of Paris, 1856, reserves no right of withdrawal; and that the parties bind themselves to enter into no arrangements inconsistent therewith.

or to regulate international action with respect to certain parts of the earth's surface. At the same time they possess a certain importance in law, in so far as they impose certain obligations or restrictions on international conduct. Such arrangements appear to have had their rise in Europe, and to have been greatly fostered by the development of what has been called the "concert of Europe" (e), and later international organisations such as the ill-fated League of Nations.

(3) *International Co-operation*.—With the ever-increasing closeness of the connection between State and State, States have tended to associate themselves together for the purpose of the joint regulation and management of certain common interests. Such interests relate for the most part, although not exclusively, to matters of economic concern (f). Other forms of international co-operation also exist with respect to the slave trade, and the regulation of fisheries outside territorial waters; whilst co-operation in judicial matters is secured by a series of extradition treaties made between particular States. The gradual formation of a habit of co-operation between States, in relation to matters of common interest, constitutes an important factor in the development of an international organisation of society.

Contrast between International Law and National Law.—A body of rules such as that which has been described must necessarily differ in many respects from State law. As between States which are independent and legally equal there is no common law-making body having power to bind them by decrees; nor is there as yet, despite the progress that has been made in that direction, any common tribunal (g) having authority to interpret and apply law in all cases as between the parties at variance; nor is there any common executive having power at once to compel resort to the tribunals and to give effect to their judgments (h). For this reason international law is not only less imperative and less explicit than State law, but it also lacks, not, indeed, all coercive force, but that particular coercive force which lies behind State law. Hence the rules that go to make up international law do not, it must be admitted, conform to that type of law with which we are now most familiar. International law stands, in fact, to States in much the same relation as the early State law did towards the clans and families that then composed the State. It is law in the course of making, and possibly destined when full grown to become law in the most complete sense of that term; in the sense, that is, of rules of conduct explicitly stated, duly applied, and adequately enforced by some external authority. But apart from this, and viewing the

(e) For a detailed account of the "concert of Europe" see Lawrence, *Essays*, p. 208 *et seq.*; also Holland, *European Concert in the Eastern Question*, and Appendix.

(f) See Oppenheim, i. p. 775-794.

(g) Saving, of course, within limits, the Court of International Justice at The Hague.

(h) These differences are well put in the judgment in *West Rand Central G. M. Co. v. R.*, [1905] 2 K. B., at p. 401.

system as it now obtains, it would seem that, on any rational view of law, whether reached by the methods of history or the process of analysis, international law must rank with "law" rather than with "morality". And this for the reasons that the rules which it embodies are in their nature not optional but compulsive, resting in the last resort on force, even though that force is exerted through the irregular action of society rather than through some definite and authorised body; that within the range of those "legal", as distinct from "political", relations, with which it professes to deal, its rules are accepted as law by States, and are appealed to in that character by the contesting parties; and, finally, that its rules have been elaborated by a course of legal reasoning, and are applied in a legal manner (i). It thus not merely operates as law, but it also stands clearly marked off from what is known as "international morality", by a radical difference both in the nature of its rules and its sanctions (k). That it is often ill-defined—that it is sometimes even set at naught by powerful States—does not appear to distinguish it effectually from the law that obtains in jurisdictions with which we are more familiar.

THE RELATION OF INTERNATIONAL LAW TO ENGLISH LAW

THE WEST RAND CENTRAL GOLD MINING COMPANY, LTD. v. REX

74 L. J. K. B. 753; [1905] 2 K. B. 391.

THIS was a petition of right, in which the suppliants, a company registered in England, but owning and working a gold mine in the Transvaal Colony, sought relief against the Crown: Prior to the outbreak of war between Great Britain and the late South African Republic, two parcels of gold, the property of the suppliants, were seized by the officials of the Republic and appropriated to its use. The Government was, according to the then law of the Republic, under a liability to return the gold or its value; but this obligation was never discharged. Soon after the seizure war broke out between Great Britain and the Republic, with the result that the latter was conquered, and its territory annexed, and incorporated in

(i) See Hall, 13.

(k) See Pollock, Oxford Lectures, p. 19.

the dominions of the Crown (*l*). It was claimed that by reason of such conquest and annexation the obligations of the Government of the Republic with respect to the gold seized had devolved on the Crown. More particularly it was contended (1) that it is a rule of international law that when one civilised State after conquest annexes another, the former, in the absence of any stipulation to the contrary, becomes bound by the obligations of the latter, save as regards liabilities incurred for the purposes of the war; (2) that international law constitutes a part of the common law of England; and (3) that the English Courts had in fact recognised and adopted the rule of transmission of obligations by virtue of conquest and annexation (*m*). On demurrer by the Crown, it was held by the Court (Lord Alverstone, C.J., and Wills and Kennedy, JJ.) that the petition disclosed no right on the part of the suppliants which could be enforced against the Crown in any municipal Court.

Judgment.] The Court, in its judgment, which was delivered by Lord Alverstone, C.J., altogether declined to accede to the proposition that, even by international law, the sovereign of a conquering State was liable for the obligations of the conquered, except in so far as he might negative such liability by express stipulation. The assumption of such obligations was, in fact, entirely a matter of discretion for the conqueror. Many such liabilities must necessarily be unknown at the time of conquest, and such a rule might entail upon a conqueror an assumption of all the liabilities of a State otherwise insolvent. It was true that the conqueror might undertake certain liabilities by convention, and good faith would then require that this should be observed. But mere silence could not be construed as a novation of all existing contracts of the Government of the conquered State. Nor was the distinction which had been drawn between obligations incurred for general State expenditure and obligations incurred for the purposes of the war a distinction which was either tenable or capable of being determined by a municipal tribunal. With respect to the opinions of the text-writers which had been cited on behalf of the suppliants, it was pointed out (1) that such opinions were often merely an expression of the ethical views of the writers; (2) that the

(*l*) This by proclamation of September 1, 1900.

(*m*) Pp. 395-397.

opinions actually cited did not fully bear out the contention of the suppliants; and (3) that even if they did they were inconsistent with the law recognised by the English Courts as to the powers of the Crown in cases of conquest (n).

With respect to the proposition that international law formed a part of the law of England, it was true that whatever had received the common consent of civilised nations must be taken to have received the assent of England; and that rules which had been so assented to might properly be called international law, and would in that character be acknowledged and applied by English municipal tribunals, when occasion arose for them to decide questions to which international law might be relevant. But such rules must be shown to be actually accepted as binding between nations; and the international law sought to be applied must, like everything else, be proved by satisfactory evidence, which must show either that the proposition put forward had been received and acted upon in English Courts, or that it was of such a nature, and had been so widely and generally accepted, that it could hardly be supposed that any civilised State would repudiate it (o). The mere opinions of jurists, however eminent, that it ought to be so received, would not in themselves suffice to show that a rule was binding. It must have received the express sanction of international agreement; or it must gradually have grown to be part of international law by frequent practical recognition in the dealings of States with each other. The statement that "international law" forms part of the law of England ought therefore to be treated as correct only if this term is understood in the sense and subject to the limitations indicated.

With respect to the third proposition—that the claim of the suppliants based on the principle above mentioned could be enforced in an English Court by petition of right—it was pointed out that this part of the case exhibited in strongest relief the difficulties in the way of the suppliants. It was not denied that it was open to the conquering State to make whatever bargain it pleased with the vanquished. It was also admitted that some obligations, such as those contracted for the purposes of the

(n) On this point reference was made to *Campbell v. Hall*, 1 Cowp. at p. 209, and *Anon.*, 2 P. Will. 75.

(o) At p. 407.

war, could not reasonably be deemed binding on the conquering State. On what principle, then, of law or equity, applicable in municipal Courts, could those Courts decide what obligations ought and what ought not to be discharged by the conquering State? On this point, moreover, a series of authorities, extending from the case of the *Nabob of the Carnatic*, 1 Ves. Junr. 371; 2 Ves. Junr. 56, down to *Cook v. Sprigg*, [1899] A. C. 572, made it quite clear that, from the point of view of English law, matters which properly belonged to the Crown to determine by treaty or as acts of State were not subject to the jurisdiction of municipal Courts, and that rights supposed to be acquired thereunder could not be enforced by such Courts (p).

This case is cited mainly as an authority on the relation of international law to English law; and as containing some important observations on the nature and sources of international law, as viewed from the standpoint of the English Courts. It is also noteworthy, however, as indicating the view adopted by the English Courts as to the effect of conquest and annexation on the liabilities of a conqueror (q). Finally, it affirms the existing rule that municipal courts cannot take cognisance of questions arising out of what are known as "acts of State". The term "act of State" in English law strictly denotes a public act, or act done by or under the authority of the Crown, outside the British territory, and affecting aliens. Such acts are not cognisable by the Courts, and in regard to them the plea of "act of State" will, if proved, serve to debar the Courts from exercising jurisdiction. In *Buron v. Denman* (1848), 2 Ex. 167, it was held that a forcible seizure and liberation of slaves owned by a foreigner in foreign territory, by a British naval officer acting under the orders of the Crown, was an "act of State" for which no action could be maintained. The same would apply to acts done in the course of war, and to transactions occurring between the Crown, or any body acting by delegation from the Crown, and some foreign State (r). The term "act of State", however, is sometimes used to express any lawful act done by the Crown or executive Government; but in so far as such an act affects the person or property of subjects within the jurisdiction its legality can always with us be questioned, and no plea of "State

(p) Cf. *Barbuit's Case*, Forrest 281; *Triquet v. Bath*, 3 Burr. 1478; *Heathfield v. Chilton*, 4 Burr. 2015; *Viveash v. Becker*, 3 M. & S. 284; *R. v. Keyn*, 2 Ex. D. 63; *Cook v. Sprigg*, [1899] A. C. 572.

(q) Vol. ii.

(r) See cases collected in *Elphinstone v. Bedreechund*, 1 Knapp 316; and *S.S. in Council of India v. Kamachee*, 13 Moo. P. C. 22.

policy" or "necessity" will debar the Courts from taking cognisance of the matter (s). It might be more convenient, to call these latter "administrative acts" pure and simple.

WALKER v. BAIRD AND ANOTHER

61 L. J. P. C. 92; [1892] A. C. 491.

THIS was an action of trespass originally brought by Baird and another (the present respondents) against Walker, the commander of H.M.S. "Emerald" (the present appellant), for entering and taking possession of certain lobster factories belonging to the respondents on the coast of Newfoundland. The appellant pleaded, in substance, that he had acted under the orders of the Crown for the purpose of enforcing a convention or *modus vivendi*, which had been entered into with the French Government, for regulating the conduct of the lobster fisheries on certain parts of the coast of Newfoundland; that such agreement had provided, amongst other things, that no lobster factories not in operation on July 1, 1887, should be permitted except by the joint consent of the commanders of the British and French naval stations; that the lobster factories of the respondents had been carried on in contravention of such agreement; that the appellant in doing the acts complained of had acted in a public capacity and in the discharge of the authority committed to him by the Crown, and that such acts had been confirmed and approved by the Crown; and, finally, that any such acts, being matters of State arising out of political relations between Her Majesty and the French Republic, and involving as they did the construction of treaties and of the *modus vivendi*, were "acts of State", and matters which could not be inquired into by the Court. On appeal to the Privy Council it was held, affirming the judgment of the Supreme Court of Newfoundland, that the defence alleged disclosed no answer to the action.

Judgment.] In the judgment of the Privy Council, which

(s) *Entick v. Carrington*, 19 St. Tr. 1030; Anson, Law of Const. ii. 318.

was delivered by Lord Herschell, it was laid down that on the facts disclosed the respondent must succeed, unless it could be shown that, as a matter of law, the appellant's acts could be justified on the ground of having been done by the authority of the Crown and for the purpose of carrying out a treaty entered into between the Crown and a Foreign Power. The suggestion that the appellant's acts could be justified as "acts of State", and that the Court was not competent to inquire into a matter involving the construction of treaties or similar Acts, was dismissed as wholly untenable. It was pointed out that it had been admitted in argument that the broad proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever this might be necessary in order to compel obedience to the provisions of a treaty could not be maintained. Nevertheless it had been contended that, inasmuch as the power of making treaties belonged to the Crown, there must necessarily reside in the Crown a power of compelling its subjects to obey the provisions of a treaty made for the purpose of putting an end to a state of war. It had been further contended that if this were so, then such power must also extend to the provisions of a treaty having for its object the preservation of peace; and that an agreement which was made to avert a war which was imminent must be regarded as akin to a treaty of peace, and as being subject to the same constitutional rule. Whether such a power did exist in the case of treaties of peace, whether it existed in the case of treaties akin to treaties of peace, and whether, finally, in both or either of such cases interference with private rights could be authorised otherwise than by legislation, were grave questions on which the Judicial Committee did not find it necessary to express an opinion; but they agreed with the Court below in thinking that the allegations contained in the statement of defence did not bring the case within the limits for which alone the appellant's counsel had contended (*t*).

(*t*) Cf. also *Damodhar Gordham v. Deoram Kanji*, 1 App. Cas. 332; *Conway v. Davidson*, 10 East, 536; *Flindt v. Scott*, 5 Taunt. 674; *Bazett v. Meyer*, 5 Taunt. 824; *Auberl v. Gray*, 32 L. J. Q. B. 50.

This case decides, although not, perhaps, very definitely (*u*), that under the English law it is not competent to the Crown or executive, even when acting in pursuance of its treaty-making power, except possibly in the case of treaties of peace, to divest or modify rights conferred by the ordinary law. Indirectly, however, it serves to show that international agreements to which this country may be a party, and obligations arising therefrom, if they are in conflict with established rules of English law, will not be regarded as a part of the ordinary law of the land, except in so far as they may have received the assent of the Legislature. Hence, in English law, treaties which affect private rights must have a legislative sanction.

How International Law and Treaties may affect Private Rights.—

International law is primarily concerned with the relations of independent States (*a*). Such relations are outside the jurisdiction of municipal tribunals and cannot in themselves become the subject of judicial cognisance (*b*). Nevertheless private rights and obligations are often affected, and to an important degree, by the application or interpretation of those customary or conventional rules which govern the relations of States. Thus, under the customary rules of international law, a person otherwise subject to jurisdiction may be exempt by the reason of his representing some foreign State; or a contract otherwise valid may be dissolved by the outbreak of war between the States to which the parties respectively belong; or a commercial venture otherwise legitimate may become unenforceable by reason of its involving a breach of neutral duty. And the same observations apply also to treaties. A treaty is primarily a compact between independent States, and its observance or non-observance will be a matter solely for international negotiation or reclamation. Nevertheless treaties may equally affect private rights and obligations; whilst in some systems of municipal law they will serve to confer rights or impose obligations which the Courts will enforce (*c*). So, a treaty may confer or limit the right of entry into the territory of a State; or it may affect the conditions under which goods from one State may be imported into another; or it may regulate the enjoyment of property by private persons, including copyright and patent right; or it may empower the surrender of persons charged with certain offences, or it may

(*u*) The Privy Council, it will be noticed, contents itself with deciding, in terms, that the allegations contained in the defence did not bring the case within the limits of the proposition contended for by the appellant—*viz.*, that such matters were acts of State, and not cognisable by the Courts.

(*a*) There has, however, been an increasing tendency amongst modern writers to place greater emphasis than was formerly the case on the position occupied by the individual in consequence of the rules of international law. Oppenheim, i. 504-10; Idelson in *Grotius Society Transactions*, vol. 30 (1944), p. 50; Lauterpacht in *Grotius Society Transactions*, vol. 25 (1939), p. 51.

(*b*) *Elphinstone v. Bedreechund*, 1 Knapp, 316.

(*c*) See the *Head Money Cases*, 112 U. S. 580.

stipulate for the doing of acts which in some way restrict or invade ordinary rights. Hence in each system it is important to ascertain the relation in which treaties stand to the law of the land—whether, in fact, such treaties, if duly made, will of their own force operate as law, or whether, in so far as they affect private rights and obligations, they require some legislative or other sanction.

The Relation of International Law to English Law (d).—Notwithstanding some statements to that effect made by the text-writers, and some dicta to be found in the decisions, it can scarcely be said that the law of nations is “adopted in its full extent by the common law”; or that it is “deemed to be part of the law of the land” (e). “The true relation may perhaps be expressed in the following propositions: (1) English law recognises the existence of international law as a body of rules capable of being ascertained, and when ascertained as binding on States either by immemorial usage or by virtue of agreement (f). (2) When once a rule of international law is shown to have received the assent of civilised States it will also be deemed to have received the assent of this country, and will in that character be applied by English Courts in cases coming before them to which such rule may be relevant (g). (3) But there are certain rights and obligations arising out of international relations, or purporting to rest on international law, which will not be deemed to be within the competence of municipal Courts (h). So in *Cook v. Sprigg*, [1899] A. C. 572, it was held that annexation was an “act of State”, and that obligations arising under a treaty to that effect were not of a kind which a municipal Court could enforce. (4) Moreover, the Courts in interpreting and applying municipal law, whilst they will always seek to adopt such a construction as will not bring it into conflict with the law of nations, cannot of course give effect to its rules however clear, or to rights or obligations deducible therefrom, in a case where these rules derogate from or are inconsistent with the positive regulations of municipal law (i). An Act of Parliament in conflict with the rules of international law must be enforced by the Courts (k). Nor can an English

(d) See an article on this subject by Westlake, L. Q. R. Jan. 1906, p. 14.

(e) See Blackstone, Com. 4th ed. iv. 67; and *Triquet v. Bath*, 3 Burr. 1478; and Atkin, L.J., in *Commercial Estates Co. v. Board of Trade*, [1925] 1 K. B. 271, at p. 295. See, however, Oppenheim, i, p. 36-7 (5th ed.).

(f) See *R. v. Keyn*, 2 Ex. D., at p. 151; *West Rand Central G. M. Co. v. R.*, [1905] 2 K. B. at 407; and for instances of statutory recognition, 7 Anne, c. 12, and *Viveash v. Becker*, 3 M. & S. at p. 292; and the Foreign Marriage Act, 1892, s. 19.

(g) See *West Rand Central G. M. Co. v. R.*, *supra*, at pp. 406 and 407; and for an illustration of such application, *Macartney v. Garbutt*, 24 Q. B. D. 368, and *Chung Chi Cheung v. The King*, [1939] A. C. 160, at p. 167.

(h) See *West Rand Central G. M. Co. v. R.*, *supra*, at p. 409.

(i) This is probably now unquestionable, in spite of some dicta to the contrary contained in the Prize Cases; see Holland, *Studies in International Law*, p. 196 *et seq.*, and cases there cited.

(k) *Mortensen v. Peters*, 14 S. L. T. R. 227; (1906), 8 Fraser 93.

Court disregard judicial decisions of a Court of superior or equal authority. The assent by the executive authority to a new rule affecting international relations which was in conflict with the established law of England would require legislation to ensure its enforcement by the Courts, unless it could be shown that the executive in the matter to which it related had power to alter the law. (5) With respect to treaties, in particular, the Crown cannot claim, in virtue of any obligations arising out of a treaty not sanctioned by statute, to modify or interfere with rights arising under the ordinary law of the land (*l*). At the same time the inability of the Courts to give effect to international obligations as against subjects will not, of course, have the effect of freeing a State from its international responsibility for their non-fulfilment. "It is a general principle of international law", said the Permanent Court of International Justice in 1930, "that in the relations between Powers who are contracting parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty" (*m*). But in a national Court where there is conflict between clear provisions of national and international law those Courts will in general be bound by the national law (*n*). (6) English law embraces a variety of statutes which have been passed from time to time for the purpose of enabling the Crown to carry out more effectually its international obligations, and more especially to enter into and carry out particular treaty arrangements concluded with other States; and to this extent international law, and the obligations arising thereunder, will constitute a part of the law of the land, to which the Courts will in a proper case give full effect (*o*). The wide general proposition that international law is part of the law of the land may be contrasted with more recent dicta. Thus Lord Atkin, delivering judgment in the Judicial Committee of the Privy Council in the case of *Chung Chi Cheung v. The King*, [1939] A. C. 160, says: "So far, at any rate as this country is concerned, international law has no validity, save in so far as its principles are accepted and adopted by our own domestic law. . . . The Courts acknowledge the existence of a body of rules

(*l*) *Walker v. Baird*, [1892] A. C. at p. 497.

(*m*) Advisory Opinion, *Greco-Bulgarian Communities* (P. C. I. J., Series B, No. 17, at p. 32; Annual Digest, 1928-30, No. 2). See also *Free Zones of Upper Savoy Case*, P. C. I. J., Series A, No. 24.

(*n*) See, for example, *Czecho-Slovak Agrarian Reform (Swiss Subjects) Case* (Czecho-Slovakia), 1926, Annual Digest, 1925-6, No. 5; *Schreble v. Procurator General of Brussels*, 1925 (Belgium), *ibid.*, No. 6; *Rhineland Ordinances Case* (Germany), *ibid.*, No. 7; *Domingès Caitano Rodrigues v. Ministère Public*, 1938 (Egypt), Annual Digest, 1938-40, No. 186; *Lanco v. Singer Co.*, 1930 (France), *ibid.*, 1929-30, No. 153; *Ogijewicz v. Governor of Wilno*, 1928 (Poland), *ibid.*, 1927-8, No. 7, cf. *ibid.*, No. 9; *Mannheim Convention Case* (Holland), *ibid.*, 1933-4, No. 4, and as to Dutch practice re Treaties, *ibid.*, 1931-2, p. 354 n.

(*o*) See, by way of illustration, 7 Anne, c. 12; the Seal Fishery Act, 1893, enabling effect to be given to the award made in the Behring Sea dispute; the Extradition Acts, 1870 to 1906; and the International Copyright Act, 1836. On the general question of the relation of treaties to English law, McNair, *Law of Treaties* (1938), pp. 7-46.

which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals". See also Lord Atkin's earlier dicta to the same general effect in *Commercial Estates Co. of Egypt v. Board of Trade*, [1925] 1 K. B. 271, at p. 295, which Oppenheim, i. 37 n. (5th ed.), disapproves. Lord Atkin's view appears to the editor both in harmony with the dicta in the *West Rand Central Gold Mining Case*, *supra*, and with dicta of Judges in the *Franconia Case* (*infra*, p. 144).

Treaties under the Law of the United States.—Although it has been laid down that international law forms part of the law of the United States, yet it is apprehended that, save in the matter of treaties, the relation of international law to municipal law is much the same as that which obtains under the English law (*p*). But on the subject of treaties, it is provided by the Constitution, Art. 6, that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land". Hence all treaties, if they are duly made and "self-executing", together with rights and obligations arising thereunder, will, in so far as they properly fall within the cognisance of the judicial power, be recognised and enforced. So in *Foster v. Neilson*, 2 Pet., at p. 314, it was said: "A treaty is in its nature a contract between two nations. . . . It does not generally effect, of itself, the object to be accomplished . . . but is carried into execution by the sovereign power of the respective parties. In the United States a different principle is established. The constitution declares a treaty to be the law of the land. It is consequently to be regarded in Courts of justice as an equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract when either party engages to perform a particular act, the treaty addresses itself to the political, not to the judicial, department, and the legislature must execute the contract before it can become a rule of the Court". A treaty will therefore be enforced by the Courts even though it overrides previously existing statute law, provided that it is not contrary to the Constitution of the United States. At the same time treaties, even though they may remain in force internationally, will not be given effect to by the Courts if the rights or obligations arising thereunder are nullified by subsequent statutes (*q*)./

(*p*) See, for example, *Schroeder v. Bissell, Collector (The Over the Top)*, 5 F. (2d), 1925, 838, 842; Hackworth, Digest I, 26.

(*q*) See *Whitney v. Robertson*, 124 U. S. 190, Scott, 568, *infra*, p. 363; *Thomas v. Gay*, 169 U. S. 264, cited in *Totus v. U. S.*, Annual Digest, 1941-2, No. 1. See on this subject generally, Oppenheim, i. 33-43; Keith's *Wheaton*, i. 23-30; Picciotto, *The Relation of International Law to the Law of England and the United States* (1915); *The Enforcement of International Law through Municipal Law in the United States* (1916); Masters, *International Law in National Courts* (1932); Dickinson in A. J., xxvi (1922), pp. 239-260.

INTERNATIONAL PERSONS

(i) STATES

EMPEROR OF AUSTRIA v. DAY AND KOSSUTH

(1861), 30 L. J. Ch. 690; 2 Giff. 628.

KOSSUTH, a leader in the Hungarian revolt against Austria in 1848, in 1860, when a refugee in England and still claiming to be the lawfully appointed President of Hungary, employed Day to print currency notes intended for circulation at some future date in the Republic of Hungary. The notes were not imitations of the existing notes of the kingdom of Hungary, but were of an entirely new design to be issued when the revolutionary party had gained possession of the country.

The Emperor of Austria, as King of Hungary, applied to the English Court of Chancery for an injunction restraining the manufacture of such paper money, and for an order for the delivery up of the notes already manufactured.

The Vice-Chancellor (Sir J. Stuart) held that the Emperor of Austria was the acknowledged possessor of the sovereign Power in a foreign State at peace with Britain. The manufacture of a large quantity of paper, intended to be used as the public paper money of Hungary at some future time, was not merely a public wrong relating solely to the political affairs of a foreign State and outside the jurisdiction of British Courts. The regulation of coin and currency of every State is a great prerogative right of the sovereign Power. It is not a mere municipal right or mere question of municipal law. Money is the medium of commerce between all civilised nations; therefore the prerogative right of each sovereign State as to money is but a great public right recognised and protected by the law of nations. A public right recognised by the law of nations is a legal right, because the law of nations is part of the law of England. Foreign States at peace with England have always been held entitled to the assistance of the law to protect their rights. Even the sovereign Power under a revolutionary government recognised for the time by the Crown of England as an existing government has had its rights protected. The existing rights of the plaintiff as sovereign of Hungary were

recognised by the Crown of England, and the protection asked for must be granted.

The above case is one of the many cases brought in the English Courts in which the plaintiff was a foreign sovereign or a foreign State. The Austro-Hungarian Empire was at the time a member of the European community of nations amongst whom the rules of modern international law were first developed. The organisation of that Empire was a dual monarchy, the Emperor of Austria being also King of Hungary; a form of organisation known to writers on international law as a real union, the component parts enjoying considerable local autonomy, but the whole Empire being considered one international person in the sphere of foreign affairs. The attempt of Kossuth to allege that the Emperor of Austria was not legally King of Hungary was brushed aside by the Court, which held that he was the undoubtedly recognised sovereign of the whole Empire. The case may also be considered in connection with the relation of international law to the law of England (*supra*, pp. 12-21), cf. Case No. 4, Annual Digest, 1941-2; *Anderson v. N. V. Transandine Handelmaatschappij*, (*infra*, p. 24).

General Note.—International law consists of rules of conduct governing primarily the relations between sovereign States. The existing rules of law grew up as rules observed by the civilised States of Europe. The law was conceived as a law binding States rather than individuals, and it was only through their position as citizens of some State that individuals were subject to its rules. At the beginning of the nineteenth century, therefore, it was almost universally held by international jurists that States, and States only, have rights and duties under international law—that States only, in fact, are international persons (*r*).

There have, however, now come into being certain international organisations on which rights and duties similar to those enjoyed hitherto by States only, and to which it seems impossible to deny international personality. In recent years, too, there has been an increasing attack on the dominant doctrine on the part of writers stressing the steady rise in the importance of the individual in international relationships, and anxious further to extend that importance. International practice, however, would seem still to rest firmly on the side of the older doctrine that international law is primarily law governing the relations of States to each other, and to each other's subjects.

(*r*) *E.g.*, Oppenheim, i. 99 (1st ed., 1905): "Sovereign States exclusively are international persons, i.e. subjects of international law".

**ANDERSON v. N. Y. TRANSANDINE
HANDELMAATSCHAPPIJ ET AL.**

[United States, Supreme Court of New York, New York County, May 22, 1941, Supreme Court of New York, Appellate Division, First Department, November 14, 1941; Court of Appeals of New York, July 24, 1942; Annual Digest of Public International Law Cases, 1941-2. Case No. 4.]

By a decree, dated May 24, 1940, of the Royal Netherlands Government, which had been driven from Holland by the German invasion, and was then in England, all Dutch claims to title in property outside Europe were declared to be vested in the Netherlands Government. The rights thus transferred to the Government were to be exercised only for the conservation of the rights of the owners. The purpose of the decree was not confiscatory but merely to prevent the possibility of the control over such Dutch property abroad falling into German hands.

Certain Dutch securities had been deposited with the defendant corporation by Martin Tietz, a resident of Cuba, believed to be a native of Liechtenstein. These had been assigned, for collection, to the plaintiff. On action being brought, the Netherlands Government intervened to assert its title to the securities. The question, therefore, turned on whether the Court would recognise the validity of the Netherlands decree.

The lower Court held that the Netherlands decree was a valid act of the State of the Netherlands, and had vested in the State of the Netherlands title to the property sought to be attached. It was for the political department of the Government to determine what government was to be regarded as the representative of a foreign sovereign State; and the Government of the United States recognised the Government that promulgated the decree as the Government of the Kingdom of the Netherlands. A right acquired under foreign law is, by comity, recognised and enforced in U.S. Courts unless against the public policy of the forum. *U.S. v. Belmont* decides that as between a foreign government and its nationals, leaving aside the question of adverse claimants, even a confiscatory decree of a foreign government would be recognised. The decree of the Netherlands Government was not confiscatory but conservatory

—a measure of protection, not of expropriation. The policy of the forum should therefore be to uphold the Netherlands decree.

On appeal the judgment was affirmed. The Court held that there was no doubt that the decree of May 24, 1940, promulgated by the recognised Netherlands Government was part of the law of a friendly sovereign State of which the defendants were subjects, and in which they were still domiciled, and that under the decree the title to the property was vested in the State of the Netherlands. By the comity of nations, rights based on the law of a foreign State to intangible property which is treated as situated in New York State were recognised and enforced by the Courts unless such enforcement would offend the public policy of the State. The decree in question did not offend such policy, was confiscatory, and should therefore be treated as valid.

This case illustrates the recognition in a United States Court of the decree of the recognised government of a foreign sovereign State enacted when that government had been expelled from the territory of its State which was entirely occupied by an enemy. The Netherlands Government, though operating from London, remained in the eyes of the United States the representative of the sovereign State of the Netherlands, whose decrees would be enforced in U.S. Courts subject to the same limitations as apply in the case of other sovereign States. The case may be compared with other cases on recognition of the acts of States and governments (*infra*, pp. 59-72), and in particular with the cases arising from the confiscatory legislation of the Soviet Government.

THE "CHARKIEH"

(1873), 42 L. J. Adm. 17; 4 A. & E. 59; 120.

THIS was an action *in rem* instituted by the owners of the s.s. "Batavier" and others against the s.s. "Charkieh" for the recovery of damages sustained by reason of a collision that took place between the two vessels on the Thames on October 19, 1872. After the arrest of the "Charkieh", an application was made to restrain further proceedings on the ground that she was the property of the Khedive of Egypt, and hence a public vessel of the Government of Egypt, and as such not amenable to

the jurisdiction of the English Court of Admiralty. It appeared, however, that the "Charkieh", although carrying the flag of the Ottoman navy, had come to England with cargo and had been entered at the Customs like an ordinary merchant ship, and that at the time of the collision she was under charter to a British subject and advertised to carry coals to Alexandria. In the result it was held that the Khedive was not entitled to the privilege of a sovereign prince; and the protest against the jurisdiction was therefore overruled.

Judgment.] Sir Robert Phillimore, in his judgment, considered two questions: (1) whether the "Charkieh" could be said to be the property of the sovereign prince; and (2) whether, assuming the Khedive to enjoy the status of a sovereign prince, the vessel could, under the circumstances, still claim immunity from jurisdiction. On the question as to whether the "Charkieh" was exempt from the local jurisdiction by reason of her being the property of a sovereign prince, Sir Robert Phillimore stated, as the results of an historic inquiry into the subject of the status of the Khedive of Egypt: (1) that in the firmans granted by the Porte to the Khedive, Egypt was invariably spoken of as one of the provinces of the Ottoman Empire; (2) that the Egyptian army was regulated as part of the military force of the Ottoman Empire; (3) that the taxes were imposed and levied in the name of the Porte; (4) that the treaties of the Porte were binding in Egypt, and that she had no separate *jus legationis*; and (5) that the flag for both the army and navy was the flag of the Ottoman Empire. All these facts, according to the unanimous opinion of accredited writers, were incompatible with those conditions of sovereignty which were necessary in order to entitle a country to be ranked as a member of the great community of States. Nor did the fact that the office of the Khedive was hereditary make any difference in this respect; for the hereditary character did not in itself confer on the holder the right of making war and peace, of sending ambassadors, or maintaining a separate naval and military force, or of governing at all except in the name and under the authority of his sovereign. For these reasons the Khedive could not be regarded as a sovereign prince, or even as the ruler of a "semi-sovereign" State; although the learned Judge incidentally expressed the opinion that if the Khedive

could have established a claim to be the ruler even of a semi-sovereign State he would have been entitled to require from foreign States the consideration and privileges incident to the status of sovereignty (s). Nor could it be urged in favour of the exemption of the "Charkieh" that, although claimed as a public vessel of the Egyptian Government, she must nevertheless be regarded as a public vessel of the Ottoman Government, of which the Government of Egypt formed a part, for the reason that, although an intimation of the circumstances had been made to the Ottoman Ambassador, no reply had been received, and no intervention had taken place on behalf of the Porte. On these grounds, therefore, the learned Judge came to the conclusion that the Khedive had failed to establish his title to the status of a sovereign prince according to the criteria of sovereignty required by "the reason of the thing", and by the usage and practice of nations as expounded by accredited writers upon international jurisprudence.

It should be noticed that the question in this case was not whether Egypt could be regarded as a semi-sovereign State, but whether it could be regarded as a separate political society, or as "a State" in international law. Amongst the various criteria which were applied in determining this question, prominence was given to the following: (1) The independent exercise of authority over the inhabitants of the territory in question in the matter of government and taxation; (2) the maintenance of a separate military and naval force; (3) the possession of a separate flag and a separate *jus legationis*; and (4) the possession of an independent right of making peace and war, and treaties. If to these tests be added that of recognition by other States, the result may be said to embody a fair statement of the conditions necessary to constitute a "State" in international law. It needs to be observed, however, that Sir R. Phillimore, in his judgment, though he had in fact before him a certificate from the Foreign Office that Egypt was not recognised by the British Government as a sovereign State, thought it necessary to examine the facts relating to the position of that country. Lord Esher, M.R., in *Mighell v. Sultan of Johore*, [1894] 1 Q. B., at p. 158 (*infra*, p. 104), took exception to this method of investigation, and it has now been authoritatively laid down as the settled practice of the Courts that in any case of uncertainty as to the status of any foreign government information should be sought from a Secretary of State, and the information so received be treated as

conclusive (t). Questions of international status are therefore referred to the political department of government.

British policy was in 1873 concerned with the maintenance of Turkish integrity, and it is not surprising, therefore, to find the British Government laying emphasis on Turkish suzerainty over Egypt. Hence Egypt was recognised in this case as a province of Turkey rather than as a semi-sovereign State. On the actual facts of the position in 1873, the Khedive of Egypt might well have been considered as sufficiently independent for the grant of immunity from process in British Courts, such as was accorded in 1894 to the Sultan of Johore, or in 1924 to the Sultan of Kelantan. In dealings with States not undoubtedly fully independent, the governments of third States are not unlikely to be more backward in their recognition of sovereign immunity than the government of a protecting State in relation to the ruler of the protected State. Thus, a Netherlands Court in 1921 held that the Dominion of South Africa was not entitled to immunity from process as a sovereign State: *Union of South Africa v. Herman Grote*, Annual Digest, 1919-22, Case No. 8.

Meanings of the Term "State".—In the domain of municipal law "the State" is commonly used to denote "the organised community", as distinct from its individual members (u). This in some systems is itself a juristic person, capable of legal rights and duties, and often invested with special privileges and immunities not possessed by ordinary persons, whether natural or legal; whilst in other systems it is legally represented only through the person of the Sovereign: Again, under that particular form of State organisation, known as Federal Union, "a State" denotes one of a number of political communities, formerly distinct, which have become united on terms by which they retain their separateness for some purposes, but for other purposes transfer their powers to some central authority, which represents internationally the entire Union. But for the purposes of international law, "a State" denotes not merely an organised community but an organised community possessing certain qualifications which are deemed essential to the maintenance of international relations.

States as International Persons: "Normal" and "Abnormal".—

A "State" for the purposes of international law may be described as a people permanently occupying a fixed territory; bound together into one body politic by common subjection to some definite sovereign

(t) *Duff Development Co. v. The Kelantan Government*, [1924] A. C. 797, *infra*, p. 39. See also *Taylor v. Barclay*, 2 Sim. 213; *City of Berne v. The Bank of England*, 9 Ves. Jnn. 347; *The Ionian Ships*, 2 Spinks 212; *R. v. Bottrill, ex p. Kuechenmeister*, 175 L. T. 232.

(u) It has, of course, a variety of other meanings, such as the "central political authority", as distinct from local authorities; the "civil power" as distinct from the "ecclesiastical".

authority; exercising through the medium of an organised government a control over all persons and things within its territory (a); and above all capable of maintaining relations of peace and war with other communities. Such communities, whether designated as States or nations, will, if recognised by other States (b), constitute "international persons". Each such State, in fact, constitutes a collective person into whose corporate body, for the purposes of international law, all its individual members are absorbed. It would seem, although this is not the prevalent view, that any community which possesses these attributes, and which is capable of foreign relations, including those of peace, war, and neutrality, is entitled to be regarded as an international person, and as a State of international law; this, whether it be fully sovereign or semi-sovereign, and whether Christian or non-Christian. At the same time, in view of the fact that international law is the special product of European civilisation, and that some of its rules are in their nature scarcely applicable to the States that have arisen outside that civilisation, and in view, also, of the fact that some States possess only a limited capacity for foreign relations, a distinction has been drawn between normal and abnormal international persons (c). In the former category are placed those States which are at once recognised as fully sovereign and as members of the family of nations. It is as between this class of States that the theory of legal equality and the most complete application of the rules of international law may be said to prevail. In the latter category are placed (1) States which, although fully sovereign, are yet, by reason of their difference of civilisation or their removal from Western influences, not recognised as members of the family of nations, although it will not follow that they are therefore to be regarded as outside the pale of international law; and (2) States which, even though they may have inherited the European civilisation, are yet not fully sovereign, but have parted with some share of control over their foreign relations. Such States are only in a limited degree the subjects of international law (d), and may, for the purposes of international law, be said to resemble persons subject to the disabilities of minority or alienage in municipal law. The line of demarcation is, it is true, somewhat hard to draw, and the practical consequences of the distinction are somewhat difficult to define, both being interpretable only by reference to the origin and development of the system of inter-

(a) Although not always an exclusive control.

(b) As to Recognition, *infra*, p. 70.

(c) See Holland, *Jurisprudence*, p. 395; for a judicial recognition of this view as regards the applicability of rules of international law, see *The Hurtig Hane*, 3 C. Rob. 324; and *The Madonna Del Burso*, 4 C. Rob. 169.

(d) See *The Madonna Del Burso*, 4 C. Rob. 169, at p. 172, where Lord Stowell, in speaking of certain non-Christian communities, said that: "In consideration of the peculiarities of their situation and character, the Court has repeatedly expressed a disposition not to hold them bound to the utmost rigour of that system of public laws, on which European States have so long acted, in their intercourse with one another".

national law. Nevertheless the distinction is one that needs to be recognised; for the reason that it not only corresponds with existing conditions but also serves to explain much which might otherwise appear anomalous as regards the treatment of certain States which are admittedly international persons, although not of the family of nations. At the same time it must always be borne in mind that abstract classifications such as these are not to be treated as being in themselves a source of legal right; and that questions of international status must always depend upon the actual relations of States.

The Family of Nations.—Strictly, perhaps, international law should be regarded as applying equally to all communities that answer to the description of States. But, in fact, owing to the circumstances of its development, its actual scope, at any rate as regards the most complete application of its principles, is probably somewhat narrower. It was in its commencement the outcome of conditions and of a civilisation exclusively European; and many of its rules still bear the impress of their origin. It grew up amongst a group of European States, which, although in frequent conflict with each other, were yet linked together by the ties of a common religion, a common civilisation, somewhat similar ethical standards, as well as by a multitude of common interests. Hence, the term "family of nations" may fairly be employed for the purpose of describing a community of States which have attained a certain level of civilisation; which are bound together by a variety of common interests; and which are also in the habit of acting together in matters necessary to the maintenance of joint international life.

The League of Nations.—After the First World War of 1914–19, an attempt to prevent the recurrence of a similar catastrophe by the organisation of the family of nations on a firmer foundation with the purpose of promoting international co-operation and achieving international peace and security, took the form of the establishment of the League of Nations. This was set up under the Covenant of the League of Nations forming part of the Treaty of Versailles, under which there came into being a council and an assembly with a permanent secretariat at Geneva, the seat of the League. Determined aggression on the part of major Powers having proved too strong for the resolution of the members of the League to proceed to extremities, and collectively to resist force by force, at the outbreak of the Second World War it was clear that the League had outlived its usefulness and that the machinery of international organisation must on the conclusion of peace be revised. The outcome of that revision has been the Charter of the United Nations (e).

States outside the Family of Nations.—Certain States may be said to occupy in the international system much the same position as

(e) For a further note on the League of Nations, and the organisation of the United Nations, see Appendix, p. 402, *infra*.

persons subject to the disabilities of infancy or alienage occupy in municipal law; but their exact position is hard to define. Some are subject to external control and possess at the most only a limited capacity for foreign relations. Others lie so much outside the track of civilised life that the question of their legal position is not, perhaps, of general importance. Nevertheless such States, or such of them as are capable of independent relations, are recognised as competent to enter into treaties and as being responsible for their observance; they send and receive ambassadors, and are held responsible for any invasion of the rights of embassy; whilst they are also held responsible for the security of foreigners residing within their limits, as well as for other international delinquencies. They are also recognised as capable of making peace and war; and in the case of a maritime war such a State would, if belligerent, be allowed to enforce, and be expected to observe, the customary rules with respect to neutral trade; whilst in the case of war between other States the obligations of neutrality would probably be enforced against her. On the other hand, their position differs from States within the "family of nations" in several particulars. Their territorial supremacy is less scrupulously respected; intercourse is not only often forced on them, but Europeans and Americans living within their limits are also commonly exempted from the local jurisdiction and invested with the privilege of extraterritoriality; their conduct in relation to other States similarly situated, especially in time of war, would not, probably, be judged by ordinary international standards; nor do such communities generally participate in those forms of joint action and organisation (*f*) which constitute so strong a bond between civilised States. At the same time some of these traits are marks rather of political than legal inequality; whilst others are mere incidents of their geo-political position. The rapid spread of Western civilisation renders it probable that all communities possessing the general attributes of statehood, and not cut off from international intercourse, will ultimately be brought within the family of nations (*g*). But international law cannot be said to apply to barbarous or semi-barbarous communities, which do not possess any organised government, or have no fixed territory, or are incapable of maintaining international relations, as understood by civilised States. In their dealings with such communities as these, civilised States are subject only to such restraints as may be imposed by their own notions of humanity and the sanctions of international morality.

The Commencement of Statehood: Recognition.—A State becomes an international person when it acquires those attributes of statehood already described; and when it enters into relations with other States. It is sometimes suggested that recognition by other States is necessary

(*f*) Such as extradition, postal communication, the regulation of trade and navigation, and the protection of industrial property. At the same time some are members of the Postal Union, and also of the Telegraph Union.

(*g*) As to the judicial recognition of the public acts of such States, see *The Helena*, 4 C. Rob. 3.

before a State can be regarded as an international person, or a subject of international law. This is true in so far as the tribunals of one State will, in any case in which the sovereignty of another political community or the validity of any public act done on its behalf may be involved, usually ascertain whether the community in question has been in fact recognised by their own government before they will themselves concede such recognition; but so long as a political community possesses in fact the requisites of statehood, formal recognition would not appear to be a condition precedent to the acquisition of the ordinary rights and obligations incident thereto.

Different Kinds of Recognition.—Recognition differs greatly in its object and effects, and cannot, generally, be said to be governed by legal rules; although custom furnishes certain rules of guidance in specific cases. These will be considered more particularly hereafter in connection with the subjects to which they are most appropriate; but, briefly, the different aspects of recognition would seem to be these: (1) In the case where a community revolts from the parent State of which it has hitherto formed a part, recognition by other States, whilst the issue remains undecided, is merely an acknowledgment of belligerent rights. (2) In the case where such a community succeeds in establishing its independence, or where any community severs itself even by peaceable means from the parent State, and establishes itself as a new State, recognition by other States constitutes at once an acknowledgment of its independence and of its international personality. (3) In the case where a new State is formed by the union of States previously recognised as separate, recognition would seem merely to amount to a formal acknowledgment of the new State and of its entry into the family of nations. (4) In the case where, in a State previously recognised, a new organisation or new form of government, not in privity with the old, has been set up, whether by violent or peaceable means, recognition by other States merely amounts to a formal acknowledgment of the adoption by the State in question of a new organ or agency for the conduct of its external relations. (5) In the case of a new accession to the sovereignty or titular headship of a State, recognition is merely a matter of formal courtesy. (6) Finally, in the case of States hitherto outside the sphere of European civilisation, recognition by other States may be said to operate as an acknowledgment of their capacity and intention to accept the existing international system, and, in some instances, of their full "membership" of the family of nations. But, in any case, it seems to be admitted that the mere fact of entering into diplomatic or treaty relations with a State will in itself amount to recognition (*h*). Recognition by one State will not, of course, bind other States; but recognition on the part of one or more of the leading Powers will generally be followed by recognition by others.

(*h*) On the subject generally, see Westlake, i. ch. iv; Hall, 103; Oppenheim, i. 118. See also pp. 59–72, *infra*.

The Extinction of States.—Once established or recognised as an international person, a State will retain its personality notwithstanding any subsequent changes of government, however considerable, for these are at bottom only changes in the agency by which it is internationally represented. It will also continue notwithstanding any subsequent changes of territory, so long as what remains can be considered as perpetuating the national being. But it will cease to exist if it become absorbed into another State, whether as the result of conquest or agreement; or if it is split up into new States, in such a way that its original identity is lost (*i*).

"Sovereign" and "Semi-Sovereign" States.—A "sovereign" State is one which, whilst possessing those attributes of statehood already described, is also independent of external control (*k*). "Semi-sovereign" States, on the other hand, are States which, whilst otherwise possessing the attributes of statehood, are not free in their external relations. A State, however, which merely retains its sovereignty and independence for certain internal purposes but is for external purposes only a part of some larger political body, will not be regarded as being a full international person. Such, according to the judgment in the case of *The Charkieh*, was the position of Egypt in 1873. The various forms and attributes of "semi-sovereignty" will be dealt with hereafter.

The Equality of States.—The legal, as distinct from the political, equality of States is commonly regarded as a fundamental principle of international law. It really means that all States, whether great or small, have equal rights and duties in matters of international law, and that the existing law cannot be altered by any one State or by a section of States without the express or implied assent of the others (*l*). It is, however, subject to some qualifications. In the first place, if the distinction previously drawn between normal and abnormal international persons be correct, then it would seem that the latter are only in a limited degree, and to the extent previously indicated, the subjects of international law; in which case its rules can scarcely be said to be equally or uniformly applicable to all States alike (*m*). In the second place, the recognised primacy of the Great Powers of Europe, and that of the United States, which was recognised in the institution of permanent seats on the Council of the League of Nations and on the Security Council of the United Nations, presents a contrast to the theory of legal equality (*n*). In the Security Council,

(*i*) See Hall, p. 18; and Oppenheim, i. 112.

(*k*) For a judicial recognition of this, see *The Cherokee Nation v. The State of Georgia*, 5 Pet. 1.

(*l*) See *The Antelope*, 10 Wheat. 66.

(*m*) See the observations of Lord Stowell in *The Madonna Del Burso*, 4 C. Rob., at p. 172.

(*n*) As to the primacy of the Great Powers of Europe and of the United States of America respectively, and its effects, see Lawrence, *International Law*, pp. 66, 242 *et seq.*; and Essays, p. 208. As to the Monroe doctrine,

moreover, any one permanent member is able to veto decisions, except on purely procedural matters (6). The United Nations Organisation is, however, formally proclaimed as based on the principle of the sovereign equality of all its members (p).

Unions of States.—It sometimes happens that communities which constitute a separate State for some purposes of government nevertheless constitute for other purposes only part of a larger political organisation. Strictly, international law is not concerned with questions of internal organisation, but only with the organisation which a State presents from the outside and in connection with its external relations. Amongst the various forms of union recognised by writers on public law, however, such as personal union, real union, federal union, and confederate union, we find some forms in which the constituent parts retain their international personality, and others in which they do not. A "Personal Union" occurs where two or more States otherwise distinct are ruled, although not by virtue of any permanent arrangement, by the same Sovereign. Such a form of union existed between Great Britain and Hanover from 1714 to 1837; and from 1835 to 1909 between Belgium and the Congo Free State (q). Such States, however, constitute distinct persons in international law, and are in no way responsible for each other's action, even though they may employ the same international representative (r). A "Real Union" occurs where two or more States are permanently united under one dynasty or Government, in such a way as to constitute one State for external purposes, although each retains its separateness in matters of domestic concern. Such a form of union formerly existed between Austria and Hungary and between Sweden and Norway (s). In such cases it is really the united body that constitutes the international person; although, in matters not vital to the maintenance of union, separate international arrangements are occasionally made

see Taylor, pp. 140, 150. But for a different view, see Oppenheim, i. 224. For an account of the customary rules governing the rank of States, see Oppenheim, i. 227.

(6) Charter, Art. 27 (2) and (3).

(p) Charter, Art. 2 (1), Cmd. 6666, p. 24.

(q) In September, 1908, it was arranged that the Congo Free State should be taken over by Belgium. Great Britain and the United States refused to recognise this annexation, unless some guarantee were given for the better treatment of the native inhabitants. But Germany, another signatory of the Act of the Berlin Conference of 1885, disputed this right of withholding recognition, as being a claim to interfere in the internal affairs of another State.

(r) For an account of an international controversy turning on this point, see the case of the *Suhlingen* Convention, 1803; Hall, p. 608.

(s) The union between Sweden and Norway, which existed from 1814 to 1905, was less complete, for the reason that each State retained its own commercial and naval flag. The independence of Norway as a separate State was guaranteed by Great Britain, France, Germany, and Russia in 1907 and 1908. It is disputed whether the union between Denmark and Iceland, which existed after 1918, was properly to be regarded as a real or a personal union: Oppenheim, i. 158 n.

on behalf of the constituent States. A "Federal Union" occurs where several States, or communities, formerly distinct, are united by permanent compact in such a way that the ordinary powers of sovereignty are in part vested in a federal or national Government whose authority extends over the whole union, whilst others remain vested in the Governments of the separate States; both authorities being co-ordinate within their respective spheres. Such a form of union now exists in the United States of America, the United States of Argentina, the United States of Brazil, and the United States of Mexico. Such unions constitute for the most part only one international person, for the reason that in their external relations the constituent States are represented exclusively by the national or federal Government. Some federal unions, moreover, are found to exist within the limits of a wider political organisation; but in this case they possess only limited international personality. A "Confederate Union" occurs where several States, otherwise distinct, unite for the purposes of mutual co-operation and defence, but without derogating from the sovereignty or separate identity of the individual members, save for certain limited purposes prescribed by the bond of union. Such an organisation amounts in fact to little more than a permanent league of separate States, which agree to act in concert touching certain matters of common interest (*t*). Such a form of union existed formerly, from 1815 to 1866, between the States composing the Germanic Confederation (*u*); and more recently, from 1896 to 1898, between the States of Honduras, San Salvador, and Nicaragua, in Central America. In such cases the constituent States may be said to retain their international personality; although if any considerable restriction were imposed on their external freedom of action they might perhaps more accurately be designated as part sovereign States (*a*). Switzerland also, although nominally a confederation, must nevertheless be regarded since 1848 as a federal union of States; for the reason that the control of all foreign relations now rests with the federal executive (*b*).

Permanently Neutral States.—These were States whose independence and territorial integrity were guaranteed by act of the Great Powers. The question, except so far as Switzerland is concerned, has a purely historical interest.

British Dominions.—As a result of the Imperial Conference, and of their membership of the League of Nations, and of the United Nations Organisation succeeding it, the British self-governing Dominions, are international persons. Some of them exercise the *jus legationis*. On

(*t*). In such cases, moreover, the Diet or common authority, in so far as it is empowered to act, acts even in internal matters only through the Governments of the separate States.

(*u*) For an account both of the Germanic Confederation and of the North German Confederation, which succeeded it, see Wheaton (Boyd), pp. 68 and 73.

(*a*) For the use of this term, see Oppenheim, i. 163.

(*b*) Taylor, 168; and on the subject generally, Westlake, i. 31.

the other hand, they have no distinct nationality in the technical sense. Their position with regard to the right of making peace or war is controversial. Eire, however, remained neutral in the Second World War, and, despite the imminent peril occasioned by that neutrality, it remained unchallenged.

India.—India occupies a rather special position. Enjoying dominion status within the British Empire, like other Dominions, subject to its own particular local problems and conditions, it has been for some time moving forward in the direction of greater independence. India, since the establishment of the British connection, has remained divided into two distinct governmental areas—British India, which formerly constituted an integral part of the British Empire, and the Indian Native States. The Native States are subject to the suzerainty of Great Britain, and they are debarred from all external relations. Even in their relations with the British Government they are declared not to be subject to the ordinary rules of international law. Nevertheless, for other purposes, and within the domain of private international law, such States are to be regarded as separate political societies, and as possessing an independent civil, criminal, and fiscal jurisdiction (c).

The position of India at the present time is undergoing change, the result of which it is not yet possible to predict.

Organisations not properly States (d).—Occasionally we find organisations not properly States invested with some of the attributes of States for the purposes of international law. So an insurgent province whose belligerency has been recognised by other States, especially where it is in a position to carry on war by sea, possesses the privileges and is subject to the duties attaching to belligerents under the maritime law. Such was the position of the Confederate States during the American Civil War. It is sometimes stated that trading corporations, such as the British South Africa Company, may be affected by rights and obligations of international law, on the ground that "such bodies are political entities to whom their creators have delegated powers little short of complete sovereignty" (e). But although it is true that a wide political authority is occasionally committed to such corporations, including the right of acquiring territory and entering into treaties with adjoining communities, yet such dealings are in fact contemplated only in relation to barbarous or semi-civilised communities that are themselves outside the range of international law; whilst in so far as the acts of such corporations touch the interests of other States, the parent State alone would be recognised as responsible (f).

(c) *Sirdar Gurdyal Singh v. The Rajah of Faridkote*, [1894] A. C. 670.

(d) As to the place of individuals in international law, see Oppenheim, 1. 504; Lawrence, 83; and Taylor, 210.

(e) See Taylor, 269.

(f) At the same time the public acts of such corporations as the East India

Double Sovereignty.—It sometimes happens that particular areas are found to be subject to a dual authority which varies greatly in its nature. Thus, Trieste was formerly under the joint sovereignty of Austria and the Germanic Federation (*g*). From 1878 to 1908 Bosnia and Herzegovina were occupied and administered by Austria-Hungary; although the sovereignty of Turkey over these provinces was expressly reserved (*h*). Similarly, from 1878 to 1914, Cyprus was occupied and administered by Great Britain, without any formal abandonment of the sovereignty of Turkey. In other cases territory has been ceded to one Power in usufruct, whilst the ultimate dominion remains in another. Since the reconquest of the Soudan by the Anglo-Egyptian forces in 1898, and under a convention of 1899, that province has been recognised as subject to the *condominium* of Great Britain and Egypt. Nevertheless, in *The Clan Grant* (31 T. L. R. 321), it was held to be assimilated to a neutral country. In all such cases, in determining questions both of right and responsibility, it would seem that it is the fact of actual control and exercise of authority that must be looked to. For instance, during the Turco-Italian war of 1911, Italy treated Egypt as neutral.

The British Dominions

CROFT v. DUNPHY

102 L. J. P. C. 6; [1933] A. C. 156.

THE Customs Act of Canada, 1927, had provided that any vessel hovering in the territorial waters of Canada might be searched for dutiable goods, and seized if such were found. Territorial waters were defined for the purposes of the Act as those within three miles of the shore, or, in the case of Canadian ships, those within twelve miles.

The respondent's ship, the "Dorothy M. Smart", had sailed from the French island of St. Pierre with a cargo of rum and other liquor dutiable in Canada. On June 13, 1929, when

Company are recognised in English law as being acts done in the exercise of sovereignty, and therefore as "acts of State", which are not cognisable by municipal Courts; cf. *Salaman v. S.S. for India in Council*, [1906] 1 K. B. 613.

(*g*) For an account of an interesting question which arose out of the blockade of this port in the Austro-Sardinian War of 1848, see Hall, 606.

(*h*) On October 6, 1908, Austria annexed these provinces and thus put an end to the Turkish claim to sovereignty. This involved a complete repudiation of the general engagement to Europe under the Treaty of Berlin, 1878, and also of a specific engagement made with Turkey at the same time, which was not, apparently, contradicted by a subsequent convention of 1879.

eleven-and-a-half miles from the coast of Nova Scotia it was boarded and, after examination, was seized by the appellant Customs officer. The owners of the ship sued the Customs officer in the Supreme Court of Nova Scotia for an illegal seizure of the ship.

Judgment.] Judgment was given for the defendant. On appeal, however, the Supreme Court of Canada accepted the contention of the shipowners that legislation extending the jurisdiction of Canada outside the three-mile limit was *ultra vires*.

On appeal, the Judicial Committee of the Privy Council held that the Customs Act was not *ultra vires*, and the judgment must be reversed. A State may lawfully enact hovering legislation, as the British Parliament had done in former times. That power resided also in the Dominion Parliament.

This case could hardly have arisen after the Statute of Westminster, 1931, under which the powers of Dominion legislatures to enact legislation having extra territorial operation was expressly recognised. Before 1914 the British Dominions were unknown as distinct persons in international law. Since the conclusion of the First World War the change in their position has been rapid—particularly since 1931, when the Statute of Westminster set the seal on their complete freedom from the control of the mother country. For almost all practical purposes they must now be regarded internationally as independent States, though forming part of what is now known as the British Commonwealth of Nations. British writers have in general preferred to describe the Empire as *sui generis*, rather than classing it as a Confederation of States (as, for example, does Strupp *Elements de Droit International* (French translation) (1930), vol. I, pp. 43 and 55) or a personal union under the British Crown. The Dominions now have complete legislative independence and freedom from control from British Courts, except where that control exercised by the Judicial Committee of the Privy Council has been voluntarily retained.

Their power to enter into separate treaties with foreign powers has become established, as has their right to set up their own legations in foreign countries, and to receive the envoys of those countries at home. Eire has claimed and exercised the right to remain neutral in the Empire's gravest hour of peril. Whether a strict legal right of a separate dominion to make war or peace, or to secede from the Empire exists, may perhaps still be controversial, but is never likely to be decided on strictly legal grounds. Foreign States, therefore, though taking into account the special ties binding together the British Commonwealth of Nations, are therefore justified for most purposes

in dealing with a Dominion as with any other independent foreign State. Detailed discussion of their position belongs rather to the sphere of British constitutional rather than of international law.

The decision of the Privy Council in *Croft v. Dunphy* may be compared with that of the Supreme Court of the U.S.A. in *Skiriotes v. Florida*, 1941, Annual Digest, 1941-2, Case No. 68.

(ii) SEMI-SOVEREIGN STATES

DUFF DEVELOPMENT CO. v. KELANTAN

93 L. J. Ch. 343: [1924] A. C. 707.

THIS was an appeal against an order of the Court of Appeal, reversing an order made in the King's Bench Division by Roche, J.

By a deed dated July, 1912. the Government of Kelantan had granted to the appellant company certain mining and other rights in that State. The deed contained an arbitration clause incorporating the Arbitration Act, 1889, so far as applicable. A dispute having arisen, the arbitrator made an award in favour of the company, and directed the Government to pay the costs of the arbitration. Application by the Government in December, 1921, to the Chancery Division under section 11 of the Arbitration Act to set aside the award was refused—the decision being upheld on appeal. In June, 1922, the appellant company applied to the King's Bench Division for an order under section 12 of the Act for leave to enforce the award. The Government of Kelantan did not appear on this summons, and Master Bonner accordingly made the order asked for. Kelantan then applied for a summons, which came before Master Jelf, to set aside this order. Master Jelf adjourned the hearing in order to seek information from the Colonial Office as to the status of Kelantan. The Colonial Office reply stated that Kelantan is an independent State in the Malay Peninsula, and that the Sultan is the sovereign ruler there. With this statement were enclosed the text of agreements relating to Kelantan, showing that Siam in 1902 acquired certain rights over that State, which were transferred by treaty to Britain in 1909. A further agreement had then been signed between Britain and Kelantan dated

October 22, 1910, which provided (Act 1) that Kelantan should have no relations with any foreign Power except through the British King; that British officers should be appointed to advise the Rajah of Kelantan; and that he should follow their advice on all administrative matters, except those concerning the Mahammedan religion and Malay custom. Furthermore, the Rajah was not to enter into any agreements concerning land, or grant or allow the transfer of any concession in favour of any person other than his own subjects, or appoint any but native officials, without British consent.

On this information, Master Jelf held that Kelantan is a sovereign State and reversed the order of Master Bonner. Roche, J., on appeal, reversed the order of Master Jelf. The Court of Appeal, however, restored the order of the Master. The company appealed to the House of Lords.

Judgment.] The House of Lords held that the judgment of the Court of Appeal must be affirmed. The statement of the Colonial Office that Kelantan is an independent State is conclusive and binding on the Court. It has been for some time the practice of our Courts to take judicial notice of the sovereignty of a State, and, in any case of uncertainty, to seek information from a Secretary of State. When information is so obtained the Court does not admit it to be questioned by the parties (Viscount Cave, at p. 805). The precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined not by the Courts but by the government of the country.

Notwithstanding the agreements between the Sultan of Kelantan and the British Government, that Government continues to recognise the Sultan as a sovereign and independent ruler. If after this statement a British Court took a different view, an undesirable conflict might arise. It is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive on the point.

By Lord Sumner. The principle is well settled that a foreign sovereign is not liable to be impleaded in the Courts of this country, except where he has himself submitted to the jurisdiction by invoking it as plaintiff or appearing as defendant without objection. The practice is also well settled that the

Court may, and generally should, make its own inquiry of the competent Secretary of State in order to ascertain whether a particular State is a sovereign State.

This case is virtually an appeal against *Mighell v. The Sultan of Johore*, [1894] 1 Q. B. 149, in which that practice was approved. The same procedure was followed not only in that case but in the case of the "Charkieh", L. R. 4 Adm. & Ecc. 59, the "Annette", [1919] P. 105, and the "Gagara", [1919] P. 95. Without contesting either the inconvenience or impropriety of conflicts between the High Court and the Executive on questions of sovereignty, the mere obligation of deference to any statement made in His Majesty's name was not the whole legal basis for the rule laid down in the *Johore Case*. It was a question of the best evidence rule. It is the prerogative of the Crown to recognise or withhold recognition from States or chiefs of States. This being so, the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Where such a statement is forthcoming no other evidence is admissible or needed.

The Court further held (Lord Carson dissenting) that on the facts the Sultan of Kelantan had not waived his sovereignty, either by assenting to the arbitration clause in the deed of 1912, or in taking part in the arbitration proceedings and applying to the Court to set aside the award.

This case illustrates the settled practice of British Courts when a question of the international status of a foreign State or ruler arises for determination. If the question is doubtful, the Court will not examine for itself whether a State possesses the attributes of an independent sovereign State, but will apply to the appropriate executive department, usually either the Foreign Office or the Colonial Office, for information. This practice is in line with that of the U.S.A., and it would seem to be the general practice of most of the chief States of the world to leave the decision in such matters to the executive rather than to the judicial department of government.

Lord Sumner in his judgment in the *Kelantan Case* mentions four different cases in which the practice was the same: *The Charkieh* (*supra*, p. 25), where, however, Sir R. Phillimore does not appear to have treated the Foreign Office's unequivocal statement as conclusive; *Mighell v. The Sultan of Johore*, [1894] 1 Q. B. 158, where the answer given was not a mere "yes" or "no", but an affirmative answer coupled with details explaining the treaty relations between Johore

and Queen Victoria; *The Annette*, [1919] P. 105, where the reply was that His Majesty was provisionally co-operating with the government concerned, in opposition to the Soviet Government, but had not yet formally recognised it as that of a sovereign State; *The Gagara*. [1919] P. 95, where the Foreign Office statement was that Esthonia was recognised as a sovereign State, but only provisionally. In each of these different cases the procedure of consultation of the Executive was the same, and the House of Lords in the *Kelantan Case* above has decided that the information given by the Executive must be accepted by the Court. Even Lord Carson, in that case, who confessed that had he felt himself free to examine the facts set out he might have reached a different conclusion from that of the Colonial Office, felt obliged to accept their statement. The practice has advantages in the avoidance of differences of opinion between judiciary and executive on important questions of foreign relations.

The decision by the executive, however, does not necessarily depend on purely legal grounds, and the resulting judgment of the Court is thereby limited in its general legal value.

Immunity from process may be accorded by the protecting Power even to rulers who have surrendered the control of all their external relations, such as rulers of Native States in India, *Statham v. Statham and The Gaekwar of Baroda*, [1912] P. 92.

With the recognition accorded by British Courts to rulers of protected States within the British Empire may be compared the similar immunities recognised in French Courts in the Sovereigns of French Protectorates. Morocco, for example, though by Treaty of 1912 it surrendered part of its external sovereignty and many other powers, has been held to have remained autonomous, and to be immune from the jurisdiction of French Courts. *Government of Morocco and Maspero v. Laurens and others*, 1930, Annual Digest, 1929-30, Case No. 75, and other cases.

THE IONIAN SHIPS

(1855), 2 Spinks 212.

IN 1854, during war between Great Britain and Russia, certain ships sailing under the flag of the Ionian States were captured in the Black Sea by British cruisers and brought in for adjudication, on the ground that, being owned by British subjects, they were engaged in trade with the enemy. Before going into the question of proof in each particular case, the preliminary question was argued, as to whether the inhabitants of the Ionian Islands were to be considered as British subjects

and as enemies of Russia. It appeared that these islands, which had been conquered by Great Britain during the war ending in 1815 (i), had, by the Treaty of Paris, 1815, been declared to be an independent State under exclusive protection of Great Britain; the dispositions of the treaty in this respect being guaranteed by Austria, Prussia and Russia. The government of the islands was regulated by a constitutional charter adopted by the local Legislative Assembly. In view of the actual relation between Great Britain and the Ionian States, disclosed alike by the articles of that treaty and by the construction subsequently put upon those articles in practice, it was held, in effect: (1) that the Ionian Islands constituted a free and independent State, but under the protectorate of Great Britain; (2) that although the protecting Power was invested with the right of making peace and war on behalf of the protected State, yet the mere fact of the former being at war with a third Power did not in itself involve the latter, unless such an intention was clearly expressed; and (3) that inasmuch as, in the present case, Great Britain had not declared war on behalf of the Ionian Islands as against Russia, their trade with Russia could not, under the circumstances, be regarded as illegal, or as a ground for condemning the captured vessels.

Judgment.] In his judgment, Dr. Lushington first expressed a doubt as to whether the case was one for the solution of a Court of justice at all; and whether the question did not more properly belong to the executive government. But, in any case, the question must be decided not by reference to any general principles as to the constitution of States but on a due construction of the treaty and other engagements upon which the actual relation of Great Britain and the Ionian States depended. The case for the claimants was that they were subjects of the Ionian States, and that no war having been declared for or by them against Russia, they were at peace with the latter country, and their trade consequently lawful. In these circumstances the onus of proof was thrown on the captors. It was true that the Ionian Government had published the terms of the proclamation issued in London, containing a declaration of war by Great Britain against Russia; but the

(i) This was assumed in the judgment; see p. 217.

terms of this proclamation were quite consistent with its being regarded as a simple notification of the fact that hostilities had broken out. The question then was whether it followed from the fact of Great Britain being at war with Russia that the Ionian States were also involved in that war. The answer to this question must depend upon the actual relation existing between Great Britain and the Ionian States; and this, again, must under the circumstances be regarded as depending upon the terms of the Treaty of Paris, 1815. By that treaty the Ionian Islands were constituted a free and independent State under the immediate and exclusive protectorate of Great Britain. It seemed to follow from this that Great Britain thereby became invested with a power of making war and peace on behalf of the Ionian States. But it did not by any means follow that the Ionian States would become *ipso facto* the enemies of any Power with which Great Britain might be at war; or even that Great Britain would necessarily be at war with any State against whom it might be necessary to adopt measures solely for the protection of the Ionian States. This conclusion was greatly strengthened by the fact that the other Powers who guaranteed the dispositions of the Treaty of Paris could scarcely have intended to guarantee a relation on the part of the Ionian States to Great Britain, which would involve the guarantors, on their behalf, whenever Great Britain might find herself at war with a third Power. After considering other articles of the treaty, it was pointed out that by Article VII the trading flag of the Ionian Islands was acknowledged by the contracting parties as the flag of a free and independent State. There was thus a single free and independent State; having also the flag of an independent State; even though the military, naval and diplomatic powers were vested in the protecting State. But the inhabitants were clearly in the position of protected persons, and not in the position of subjects of the protecting Power. The position was an anomalous one; but, at the same time, in view of the fact that the Ionian Islands were declared to be an independent State, it was incumbent on the Court to maintain all the rights and attributes of independence, except in so far as these might be modified by the treaty. The Ionians were clearly not British subjects in the proper sense of that term; nor were they allies in war either by their own act or that of

the protecting Power. The relation between the Ionian States and Great Britain was not in itself such as to involve the former in a war to which Great Britain might be a party; whilst no act had been done by the protecting Power to place the Ionians in that predicament. This conclusion was also thought to be confirmed by the manner in which Great Britain had exercised her treaty-making power on behalf of the Ionian Islands; such conventions having been the subject of separate negotiation, and having been concluded as on behalf of a distinct and separate State (j). If such special conclusion was necessary for purposes of a secondary character, it seemed *a fortiori* that measures of peace and war must be expressed in formal and definite shape in order to affect the relation of the Ionian States to other States.

In this case the question was whether a community, which was under the protection of another State, and which clearly did not possess complete external or even internal independence, could nevertheless be regarded as a separate entity in international law, and capable of foreign relations distinct from those of the protecting State. It was held in effect: (1) that this question depended not on any general principles of State classification but on the actual relations which could be shown to subsist between the protecting State and the protected community; and (2) that an examination of those relations disclosed the fact that in spite of large powers conceded to the protecting State, including the power of concluding treaties and making peace and war on behalf of the protected community, the latter was nevertheless intended to be treated, and had in fact been treated, as a separate political body. The latter conclusion was based on the grounds, amongst others, that the protected community had been declared to be a separate State, that it retained a separate and independent flag, and that its foreign relations, although controlled by the protecting Power, were yet required to be entered into avowedly on behalf of the protected community before they would become binding on it. As a matter of fact, Great Britain controlled not only the foreign relations but also, to a large extent, the internal executive government of the Ionian States; but despite this it was held that the latter, in view of their capacity for separate foreign relations, constituted a separate international person. In 1864, however, the Ionian Islands were, with the consent of the guaranteeing Powers, ceded by Great Britain to Greece, and now form part of that country; although the

(j) Such were the conventions of 1852 with the Netherlands, and of 1854 with Tuscany.

islands of Corfu and Paxo, together with their dependencies, were declared to be permanently neutral (*k*).

The position of Samos up to recent times seems to have been very similar to that of the Ionian Islands (*l*). The Supreme Court of the Federated Malay States in 1939 considered the possibility that these protected States might not be at war with Germany, but held that the protecting Power alone had the right to place them at peace or at war, and that the right had in fact been exercised through the British High Commissioner (*ll*).

Semi-Sovereign States.—A semi-sovereign State is one which, whilst possessing internal independence, or, at any rate, such an amount of internal independence as is necessary to constitute it a distinct body politic, together with a capacity for separate foreign relations, is yet subject, in its dealings with foreign Powers, to some restriction or control on the part of some other State. It differs from a "member State" of a federal union, for the reason that such a State, although a participant in the sovereign power, has usually no capacity for separate foreign relations. Whether a particular community possesses a capacity for separate foreign relations, and, if so, to what extent, will depend on the actual nature of the tie by which it is bound to the superior Power. Indeed, the question of sovereignty, or semi-sovereignty, or no sovereignty at all, is really a question of fact depending on the circumstances of each particular case. In determining this, regard will be had to such criteria as the possession of a separate flag, the recognition of a separate right of embassy, the exercise of a separate even though limited treaty-making power, and the recognition of a capacity for remaining neutral in the event of war between the superior Power and foreign States (*m*). Once, however, it is clear that a civilised community, possessing in other respects the attributes of a State, has this capacity for separate foreign relations, then it would seem that it is entitled to be regarded as an international person, and as having all the rights incident to that condition, in so far as they are consistent with that control over its external affairs which it has formally conceded to any other State. Its ruler, for instance, will in other countries be entitled to the personal privileges of a foreign Sovereign; its public vessels, when in foreign ports, will be exempt from the local jurisdiction; whilst its diplomatic agents will enjoy the usual privileges. Nor will it be bound by the acts of the superior Power, even within the sphere of its control, unless they are avowedly done on

(*k*) Taylor, 118.

(*l*) *Katrantzios v. The Bulgarian State* (Greco-Bulgarian Mixed Arbitral Tribunal, 1926. Annual Digest, 1925-6, Case No. 27).

(*ll*) *H. C. Van Hoogstraten v. Low Lum Sing* (Annual Digest, 1938-40, Case No. 16).

(*m*) Although this, of course, may be the issue to be decided; as occurred in the case of *The Ionian Ships*.

its behalf. Although the term "semi-sovereignty" really covers varying degrees of dependence, and although it is not possible to reduce these to definite categories, yet a distinction is usually drawn between (i) States which are subject to the suzerainty of other States, and (ii) States which are the subject of a declared protectorate.

(i) *States Subject to Suzerainty*.—The terms suzerainty and vassalage are really terms of feudal law, and scarcely appropriate to modern State relations. Nevertheless they have survived, although with a somewhat altered meaning. In its most appropriate sense, it would appear to denote a State which, although once a part of the paramount State, has as the result of agreement or disruption established itself as a separate political community, although without achieving complete independence in its external relations. The use of the term in relation to any political community is sometimes said to carry "a presumption against the possession of any given international capacity" (n). But having regard to its various applications in practice, it would scarcely seem to imply any definite relation in law; whilst the question of capacity would appear to depend on the facts of each particular case.

(ii) *Protected States*.—These are States which have either placed themselves, or have by international agreement been placed, under the protection of some other Power, under conditions entitling the latter to exercise a certain measure of control, which differs in different cases over their external and sometimes also over their internal relations. If, however, a State permanently hands over the control of its foreign relations, or any material part thereof, to another State, it will then cease to be fully sovereign; although if it retains its political separateness, together with some capacity for separate foreign relations, it will not cease to be an international person. The term "protected State", however, does not appear to imply any definite relation in law. It is sometimes said to carry with it a presumption in favour of international capacity (o); but here, as in the case of States "subject to suzerainty", the international capacity of the "protected State" will really depend on the nature of the bond or arrangement subsisting between it and the protecting Power.

Mandated Territories

THE KING v. KETTER

108 L. J. K. B. 345; [1940] 1 K. B. 787.

THE Peace Treaty of Lausanne, signed by Britain and Turkey in 1923, provided that Turkish subjects habitually resident in territories which under the terms of the same treaty were

(n) See Hall, 32.

(o) See Hall, 32.

detached from Turkey, should become *ipso facto*, in the conditions laid down by the local law, nationals of the State to which such territory was transferred.

Ketter had been born in Jerusalem of Jewish parents and, until 1923, was a Turkish subject. He had resided in Palestine until 1937, when he came to England with a "British passport—Palestine". He was allowed to land on condition that he remained in the country only for a limited period. In September, 1938, that period having expired, he received orders to leave England. He failed to comply with this order, and was ultimately arrested and convicted at the Central Criminal Court for offences against the Aliens Order, 1920. Against this judgment he appealed on the ground that he was not an alien but a British subject.

Judgment.] The Court of Criminal Appeal held that the appeal must be dismissed. Britain was not the State to which Palestine had been "transferred" within the meaning of the treaty. Examining the terms of the mandate for Palestine, the Court held that the mandate did not transfer the territory to Great Britain. Under an Order in Council, the Palestinian Citizenship Order, 1925, the appellant, *prima facie*, became a Palestinian citizen. Even if the contention of the appellant that that Order was invalid was accepted, which the Court was far from saying that they did accept, the appellant would have remained a Turkish subject. There had been no annexation of Palestine, so it could not be maintained that he was a person who had become a subject of His Majesty by reason of any annexation of territory within the provisions of the British Nationality and Status of Aliens Acts, 1914–1918.

The true effect of the mandate was that His Britannic Majesty accepted the mandate in respect of Palestine, and undertook to exercise it on behalf of the League of Nations, in conformity with the provisions contained in the mandate. There was no provision in Article 30 of the Treaty of Lausanne for the transfer of territory to Great Britain. If there had been there would have been no need for the mandate.

This case illustrates one of the more settled points which arose in connection with the special form of protected territory or

territory under guardianship established by the consent of the principal Allied and Associated Powers on the termination of the First World War (1914-19), and known as Territories under Mandate. Ketter had been an inhabitant of territory which had been overrun by the British Army under General Allenby, and which had later by the agreement of the principal Allied and Associated Powers, confirmed by the Council of the League of Nations, been entrusted to Great Britain as Mandatory Power. Turkey, in the Treaty of Lausanne, 1923, renounced her claims to the territory, but there was no cession to Great Britain or any other Power. Ketter relied on the provisions of that treaty as to transfer of nationality in the territories lost to Turkey to claim that he had become a British subject. The decision of the Court that he had remained an alien is in conformity both with the principles of the mandate system. Inhabitants of territories under mandate did not *ipso facto* become nationals of the mandatory power. Inhabitants of the more advanced territories under the system, such as Palestine, possess a special national status of their own. The inhabitants of territories under British mandate rank as British protected persons, not as British subjects. Under the British Nationality and Status of Aliens Acts, 1914-18, an alien is a person who is not a British subject. A British subject is a person who is either a natural born British subject or a person to whom a certificate of naturalisation has been granted, or a person who has become a British subject by reason of any annexation of territory. It was held in Ketter's case that Palestine had not been annexed but placed under a special regime of tutelage or protection.

Mandated Territories.—The Mandate System was a method of disposal of territories formerly in the possession of Germany or Turkey, adopted by the victorious principal Allied and Associated Powers after the First World War (1914-19). Not wishing either to return these territories to their former rulers, nor to infringe the principle of no annexations, proclaimed by President Wilson, and considering that they were not yet strong enough to be able to stand entirely alone and independent in the modern State system, the Allied Powers, in Article 22 of the Covenant of the League of Nations devised a system of guardianship or trusteeship, under the aegis of the League, until such time as the territories could be regarded as safely to be entrusted with complete independence. The territories were to be treated as falling into three rough groups. Class A: Communities formerly part of the Turkish Empire which were so far advanced that their existence as independent nations could be provisionally recognised, subject to the rendering of administrative advice and assistance by a Mandatory until able to stand alone. Under this head came the Mandates to Great

Britain for (1) Palestine and Transjordan and (2) Iraq, and that to France for Syria and the Lebanon. Of these the Iraq Mandate pursued the general course envisaged by the system, and in 1932 the Mandate was formally ended, and Iraq became a member of the League of Nations. In Syria and the Lebanon, by 1936, treaties were being negotiated between France and the Mandated territories, providing for a cessation of the Mandate. Delays, however, took place in the carrying into execution of these arrangements, and the outbreak of the Second World War found these countries still under French Mandate, which has not yet been formally terminated. The Palestine Mandate has presented a problem of peculiar complexity to the Mandatory, owing to the establishment under its terms of a national home for the Jews, which it was the Mandatory's duty to reconcile with the prior rights of the native inhabitants. Hence no united administration of the territory combining Jews and Arabs has as yet been practicable, and the maintenance of order against attacks by extremist elements on both sides has devolved upon the Mandatory with consequent delay in the achievement of the goal of complete Palestinian independence.

Under Class B Mandate came six Mandates over territories in Central Africa: British Cameroons, British Togoland, and Tanganyika under British Mandate; French Cameroons and French Togoland under French Mandate; and Ruanda Urundi under Belgium. The principle here was that the Mandatory must be responsible for the administration, and the maintenance of public order and morals, guaranteeing freedom of conscience and religion and repressing the abuses of the slave trade, arms traffic, and liquor traffic. Establishment of military and naval bases and military training of the natives for other than police purposes or the defence of territory was also to be prohibited, and there were to be equal opportunities for the trade and commerce of other members of the League of Nations. These territories have not in fact advanced outside the Colonial Protectorate stage of development.

Class C were even more completely placed under the control of the Mandatory. Owing to sparseness of population, small size, or geographical considerations, it was held they could be best administered as integral portions of the Mandatory's own territory, subject to the same safeguards as in the case of B Mandates. C Mandates were granted for South West Africa to the Union of South Africa, for Samoa to New Zealand, for Nauru to the British Empire (Great Britain, Australia, and New Zealand), for Pacific Islands north of the equator to Japan, and for Pacific Islands south of the equator to Australia.

In the case of all Mandates, the Mandatory presented an annual report to a permanent advisory commission appointed to advise the Council of the League of Nations on the observance of the Mandates.

The general framework of the Mandate system was thus provided

by Article 22 of the League Covenant, but the details of the administrative powers of the Mandatories were defined in the individual Mandates drawn up by the Principal Allied and Associated Powers and formally ratified by the League Council.

The system aimed at placing conquered enemy territories not regarded as strong enough to stand alone under the guardianship and protection of one of the victorious Powers, who were to act as mandatories or agents acting on behalf of the League, which through the Permanent Mandates Commission and the Council may be regarded as functioning as a kind of "trustee of the settlement" established by the action of the Principal Allied and Associated Powers.

The question of where sovereignty resided in a territory under Mandate was discussed by many writers and was very controversial, but is no longer worth long consideration. The practical facts of the position were that no country or body of persons was in complete unlimited control of the government and destinies of the territory. The greatest degree of control rested with the Mandatory Power. In the case of C Mandates, indeed, the control by the mandatory differed little from the administration of a colonial dependency, and the decision of the Supreme Court of South Africa in *R. v. Jacobus Christian (p)*, that an inhabitant of such a territory could be convicted of treason against the mandatory appears to accord with the facts of the position. But that control was limited by the international obligations undertaken, and intended to endure only until the territory was strong enough to be accorded complete independence, and was under the supervision of the League. The territory under Mandate was not part of the dominions of the Mandatory Powers, nor, it is believed, was the sovereignty ever vested in the League—the territory remained in a state of tutelage under the protection of the Mandatory Power (*q*).

The principles underlying the Mandate System have been reasserted in the Charter of the United Nations (Chapters XI–XIII). Members of the United Nations which have or which assume responsibilities for the administration of territories whose peoples have not yet obtained a full measure of self government, declare that they recognise the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote the well-being of these inhabitants. Under the authority of the United Nations an international trusteeship system has been established applying to such territories as may be placed under it by means of trusteeship agreements, such territories being envisaged as in three categories, the territories under Mandate, territories detached from enemy States as the result of the Second World War, and territories voluntarily placed under it by the State now administering them. The position of these

(p) South African Law Reports, [1924] A. D. 101; Annual Digest, 1923–4 Case 12; British Year Book, 1925, pp. 211–219; Hudson, Cases, p. 71.

(q) Oppenheim, 5th ed., pp. 183–200.

territories will depend on the terms of the particular trusteeship agreements, the supervision of which is entrusted to the General Assembly of the United Nations, assisted in the operation of its functions by a Trusteeship Council, acting under its authority, consisting of representatives of the administering Powers, of the permanent members of the Security Council, and a number of members elected by the Assembly for three years so as to make the total membership of the Trusteeship Council evenly divided between administering Powers and those having no such commitments. The administering Powers are to render annual reports to the Assembly on the basis of a questionnaire formulated by the Trusteeship Council. Decisions of the Trusteeship Council are to be reached by a simple majority of members present and voting.

(iii) BELLIGERENT COMMUNITIES

CONTROVERSY BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA WITH RESPECT TO THE RECOGNITION OF THE BELLIGERENCY OF THE SOUTHERN CONFEDERACY, 1861—71.

[British and Foreign State Papers, vols. 51 (1860-61), 57 (1866-67), 59 (1868-69).]

IN December, 1860, the State Convention of South Carolina adopted an ordinance of secession, dissolving its union with the United States. In the course of January, 1861, this example was followed by five other States; and before June, 1861, by five more; making eleven in all. The seceding States purported to form themselves into a new body politic under the style of the Southern Confederacy. The body politic so constituted comprised a population of some five millions of people, and possessed an organised Government (*r*); whilst its Government assumed control of all public property, and exercised in fact, and so far as was consistent with the existence of warlike operations, all the powers of government within the limits of the seceding States.

Hostilities between the Confederacy and the United States commenced on April 12, 1861 (*s*). On April 15, President Lincoln

(*r*) A provisional and thereafter a permanent constitution was adopted and duly ratified, although the latter did not take effect until February, 1862.

(*s*) This was on the occasion of the bombardment of Fort Sumter, but as early as on January 9 a vessel sent to relieve Fort Sumter had been fired on.

issued a proclamation calling out the militia, and before the end of the month some 100,000 men were under arms in the revolted portion of the country. On April 17, the President of the Southern Confederacy, Jefferson Davis, invited applications for letters of marque, with a view to carrying on war by sea. On April 19, President Lincoln proclaimed a blockade of the coasts and ports of the seceding States, "in pursuance of the laws of the United States, and of the law of Nations"; whilst, at the same time, threatening the penalties of piracy in the case of any molestation of vessels of the United States by persons acting under the pretended authority of the Confederate Government.

In April, 1861, certain commissioners were dispatched to Europe with a view to procuring a recognition of the Confederacy as an independent State. In Great Britain, Earl Russell declined to enter into any official communication with the commissioners on this point; merely stating that when the question of recognition of independence arose inquiry would have to be made as to "whether the body seeking recognition could maintain its position as an independent State", and "in what manner it proposed to maintain relations with foreign States". But whilst refusing to entertain the question of independence, the British Government, nevertheless, on May 13, 1861, issued a proclamation of neutrality, reciting that hostilities had "unhappily commenced between the Government of the United States of America and certain States styling themselves the Confederate States of America"; and enjoining a strict neutrality in the contest between the respective belligerents. This virtually amounted to a recognition of the belligerency of the Confederacy. The United States thereupon protested that the British proclamation was precipitate, unprecedented, and, inasmuch as the Confederate States had as yet no ships of war, unnecessary. The British Government, in reply, pointed out that inasmuch as there was a war actually prevailing, which affected British subjects and commerce, it was bound to come to some decision with respect to the recognition of belligerency; that a community comprising some five millions of people, which had declared its independence, could not be treated like a band of marauders or filibusters; that the United States Government had itself treated its prisoners as prisoners of war, and not as rebels; and that in any case the question of the

recognition of belligerent rights was essentially a question, not of principle, but of fact, depending on the size and strength of the insurgent body, and not on the goodness of its cause. So originated a controversy which extended over a period of ten years. In the course of this controversy Great Britain asserted that the blockade of the coasts of the Southern States under the proclamation of April 19 in itself was an acknowledgment that a civil war existed; that this had been recognised by the United States Courts (t); and that the United States could not at one and the same time exercise a belligerent right of blockade and a municipal right of closing the ports of the south (u). With respect to a proposal on the part of the United States to prohibit all intercourse with the ports of the Southern States by municipal decree (a) under pain of forfeiture, Great Britain announced that she would consider such a decree as null and void, and would not submit to measures taken on the high seas in pursuance of such decree (b); with the result that although a proclamation was formally issued prohibiting commercial intercourse between the rebellious States and other States, yet in practice the prohibition of intercourse with foreign States was left to the operation of the blockade.

In 1866, after the Southern Confederacy had been defeated, the action of Great Britain, in the matter of the recognition of the Southern Confederacy, was included in the list of grievances exhibited by the United States against Great Britain; and was made the subject of a claim for indemnity, which it was sought to include amongst those claims for alleged breaches of neutrality that were ultimately referred to the Geneva Tribunal. With respect to this particular ground of complaint, it was contended that the British Government had acted precipitately, for the reason that the civil war was as yet undeveloped; that the insurgents were without any organised military force or treasury; that the proclamation took place before they had a national flag, or were in a position to carry on war by sea; and that the

(t) The District Court of Columbia had in fact so held in the case of the *Tropic Wind*; although the Supreme Court did not so decide until December, 1862.

(u) Earl Russell to Lord Lyons, July 19, 1861 (51 S. P. at p. 206).

(a) As distinct from effective blockade.

(b) Earl Russell to Lord Lyons, July 19 and August 8, 1861 (51 S. P. pp. 205, 217).

proclamation, being for these reasons unwarrantable, amounted to a wrongful act of intervention (c). In reply, the British Government pointed out that the proclamation did no more than acknowledge a state of war first recognised by the United States Government itself, and subsequently recognised by its Courts; that the act of recognition was fully justified at the time it was made, both by the exigencies of British commerce, by the position then actually occupied by the Confederacy, and by the fact that its Government had announced its intention of carrying on war by sea. The act of recognition, moreover, was an act as to which every State must be held to be sole judge of its duty; and no precedent existed for submitting to arbitration the question whether the policy of a State had or had not been suitable to the circumstances in which it found itself placed. For these reasons the British Government, whilst willing to submit other claims to arbitration, was of opinion that on this question no such reference was possible (d).

In rejoinder the United States contended that the President's proclamation did not expressly recognise a state of war; that the recognition of a state of war by the Supreme Court was itself based on the consequences of the British proclamation; that it was the duty of a friendly nation towards a State temporarily disturbed by insurrection to forbear from conceding belligerent privileges to an insurgent body in anticipation of their concession by the State against which the insurrection was directed; that the proclamation was not justified by any necessity in the interests of British subjects; and, finally, that the United States could not consent to the waiving of any claim on the ground that it involved a point of national honour (e).

At this juncture the negotiations between the two Governments for a peaceful adjustment of the various causes of dispute existing between them threatened to break down; for the reason that Great Britain refused to submit to arbitration any claim arising out of the recognition of the Southern Confederacy; whilst the United States, on the other hand, refused to submit the so-called "Alabama" claims to arbitration without this. In the result, however, and after several other abortive attempts

(c) Mr. Seward to Mr. Adams, August 27, 1866 (57 S. P. p. 1119).

(d) Lord Stanley to Sir F. Bruce, November 30, 1866 (57 S. P. p. 1126).

(e) Mr. Seward to Mr. Adams, January 12, 1867 (57 S. P. p. 1138).

at a settlement, it was finally agreed by the Treaty of Washington, 1871, to refer to the tribunal of arbitration "all claims growing out of the acts committed by the 'Alabama' and other vessels". The effect of this appears to have been to exclude the action of Great Britain in the matter of the recognition of the Southern Confederacy from the scope of the reference, as a direct subject of pecuniary indemnity; whilst leaving it open to the United States to use it as evidence that Great Britain was at the time actuated by a conscious unfriendly purpose towards the United States, which might conceivably be regarded by the arbitrators as having a bearing on other alleged breaches of neutrality; and it was in fact in this character that the incident was dealt with in the presentment of the American case (*f*).

It will be noticed that, on the question of the recognition of independence, the British Government adopted the view that this would depend on whether the insurgent States succeeded in fact in maintaining their position as an independent community, and on whether they gave proof of a capacity for maintaining international relations; a position which was in fact never achieved. The recognition of belligerency, however, was accorded, on the ground that the Confederacy comprised an organised community, numbering several millions of persons, having a Government in full possession of a wide area of territory, and both in a position to carry on war, and intent on carrying on war, by sea. The agents of such a body could not be treated as pirates; and in default must be treated as belligerents, and brought under the recognised rules of maritime war. The justification put forward by the British Government is now commonly recognised as sound. On the other hand, the views put forward by the United States on this occasion would appear to be altogether at variance with its later practice in connection with the recognition of the State of Panama in 1903. That State seceded from the United Republic of Colombia on November 3, 1903. The United States recognised it as a *de facto* Government on November 6; and as an independent State, with which it made a treaty, on November 18; whilst at the same time it ignored the protests of the United Republic and refused to allow the Colombian troops to land.

Belligerent Communities.—These are communities which, although still forming part of some existing State, are seeking to establish either their independence, or some alteration of the existing relation by armed force. In such cases various questions are likely to present themselves for determination by other States, and incidentally also by their tribunals. Of these the most important are (1) whether such a community or body should be recognised as belligerent, and therefore as subject, although only to a qualified extent, to international law, and (2) in a case where the object of the revolt is severance, then under what conditions and at what stage such a community ought to be recognised as an independent State.

Recognition of Belligerency.—The right of one State to recognise the belligerent character of the subjects of another State, without incurring the imputation of hostility or unfriendliness, depends on a variety of considerations. In the first place, the insurgent community or body must have at its head an organised Government capable of carrying on war according to recognised rules and methods, next, there must be a war actually prevailing at the time, whilst, finally, the circumstances of the war must be such as to affect the interests of the State conceding such recognition, and to make some decision on the subject incumbent on it. If the insurgent community occupies territory situated in the midst of loyal provinces then the question of recognition will scarcely arise, except, perhaps, in relation to responsibility for injuries affecting foreign subjects. If, on the other hand, the insurgent community occupies territory adjoining that of some other State or States, then the question of recognition will be important from the point of view of the latter, in connection with the observance and enforcement of neutrality as between the contending parties. Finally, if the insurgent community is in a position to carry on war by sea, then the question of recognition will become important as regards all maritime Powers, for the reason that on this will depend the right of the insurgent Government to issue commissions and to interfere with neutral commerce (*g*). Whether such recognition should be accorded or not is a question for the political or executive department of Government, by whose action the Courts will be bound. It would seem that such recognition cannot be demanded as of right, for the reason that it is strictly a question of policy, and not of law (*h*). But once recognition is conceded it cannot be withdrawn unless the conditions upon which it depends have ceased to exist (*i*). A recognition of belligerency, if accorded, has the effect of conferring on the insurgent community, although only provisionally, and in relation to the conduct of hostilities, the rights and duties of a State in international law (*k*). It relieves the parent State from further responsibility, as regards any

(*g*) Hall, 39

(*h*) On this question, however, and also on the questions of partial recognition, see Westlake, i 55, 56

(*i*) On the subject generally, see Hall 36

(*k*) See *The Three Friends*, 166 U S 1, and Scott and Jaeger at p 894

acts of the insurgent Government that may affect the interests of other States or their subjects. But at the same time it precludes it from assuming to close, as against other States, any ports or territory in the actual possession of the insurgents otherwise than by regular process of blockade; and also from interdicting to other States intercourse with the insurgent Government (l). It brings both parties under the recognised rules of war; and as regards maritime war, confers on both the right to visit and search neutral vessels on the high seas, to establish and enforce blockades, and to intercept and confiscate contraband of war. The position of the insurgents with respect to the parent State is a question only of policy or municipal law, and is not affected by their recognition by other States; although the treatment of insurgents as rebels and not as belligerents, in a case where their belligerent character had been recognised by other States, would probably be reprobated by international morality. The position of insurgents whose belligerency has not been recognised will be dealt with hereafter, in connection with cases bordering on piracy. Here it need only be said that such bodies or persons will not be treated as pirates, and that other States will not recognise any obligation of interfering with their operations, so long as they do not commit acts of aggression against the property or subjects of States other than that against which they are in rebellion.

Recognition of Insurgency.—Professor Pitt Cobbett in his notes on recognition of belligerency makes no mention of a form of recognition having its origin in the civil troubles of the American Continent, particularly in the long struggle of Cuban insurgents against Spain, and described by Professors Wilson (m) and Hershey (n), and later writers, as recognition of insurgency. This form of recognition was accorded by the United States to bodies of insurgents who were carrying on an organised revolt against the Government of their country, but who did not possess any fixed or settled centre of government or remain in permanent control of a fixed and definite territory. The contest had become a serious interference with foreign interests, but the insurgents had not acquired a degree of permanent stability which was felt sufficient to justify declaring that a civil war was in progress in which the rebels could be given recognition as belligerents. The effect of such a recognition was that the insurgents were treated as lawful belligerents. But it was more limited than recognition of belligerency in that the belligerent rights of visit and search on the high seas, or capture of contraband, and the institution of blockades were not permitted. In the peculiar circumstances of the Civil War in Spain in 1937 an attempt was made by Britain and other Powers to apply rules which might have been appropriate to insurgents in the circumstances of the Cuban revolt, to a contest which soon became in fact in every

(l) Hall, 41 n.

(m) 1 A. J. I. L., p. 56.

(n) *Essentials of International Public Law*, 1912, pp. 118, 119.

sense a civil war between evenly matched opponents, each possessing fixed and organised Governments, and controlling definite portions of Spanish territory. The situation was complicated by the large influx of foreign volunteers into Spain, and while foreign combatants on so large a scale on both sides remained in Spain, the British and other Governments showed themselves unwilling to accord a recognition of belligerency which the circumstances of the case soon certainly came to permit, if not to require.

Recognition of Independence.—With regard to the recognition of independence, some writers suggest that this cannot be admitted until either the parent State recognises the new order of things or until the recovery of its ancient rights has become an impossibility (*o*). But so far as any practical rule can be deduced from historical examples, it seems to be this—that if the insurgent community has established a *de facto* independence, as evidenced by the fact of the parent State having relinquished active efforts to re-establish its authority, and if it possesses an organised Government capable of maintaining relations of peace and war, then recognition by other States must follow, although some may be later in according it than others. No State is entitled to prolong its sovereignty by a mere paper assertion of right. But if the contest is still proceeding in fact, then a recognition of the independence of the insurgent community by a foreign State would be a hostile or unfriendly act, which the parent State would be entitled to resent (*p*). The position of the new State, in the case where the revolting province succeeds in establishing its independence, as regards rights and obligations of the parent State in which it was previously a participant—and the position of the parent State in the case where it succeeds in re-establishing its authority, as regards the property or rights of the suppressed Government—will be considered hereafter in connection with the subject of the succession of States.

RECOGNITION OF STATES AND GOVERNMENTS

THE GOVERNMENT OF SPAIN v. THE “ARANTZAZU MENDI”

108 L. J. P. 55, [1939] A. C. 256

THIS was an appeal from a judgment of the Court of Appeal affirming an order of Bucknill, J., setting aside a writ *in rem* issued by the Republican Government of Spain, under which it

(*o*) Heffter, § 23

(*p*) See *Historicus Letters*, 9, for notable instances of recognition, Hall, 105, Taylor, 192

claimed to have possession of the s.s. "Arantzazu Mendi" adjudged to it.

In 1937 the "Arantzazu Mendi", a Spanish ship registered at Bilbao, was on the high seas when that port was captured by General Franco's Nationalist forces. She was thereupon requisitioned by the Republican Government. But on August 11, 1937, on arrival of the ship at London, her owners issued a writ in rem for possession, and she was arrested and remained under the arrest of the Admiralty Marshal. In April, 1938, she was requisitioned, with the consent of her owners, by the Nationalist Government. The Republican Government thereupon issued a writ in rem for possession. The Nationalist Government claimed that this should be set aside on the ground that it impleaded a foreign sovereign State.

The British Foreign Office, in reply to the enquiry of the Court, stated that "His Majesty's Government recognises Spain as a foreign sovereign State, and the Government of the Spanish Republic as the only de jure Government of Spain or any part of it. His Majesty's Government recognises the Nationalist Government as a government which at present exercises de facto administrative control over the larger portion of Spain. His Majesty's Government recognises that the Nationalist Government now exercises effective administrative control over all the Basque Provinces of Spain. His Majesty's Government has not accorded any other recognition to the Nationalist Government. The Nationalist Government is not a government subordinate to any other government in Spain". Whether on these facts the Nationalist Government was to be regarded as that of a foreign sovereign State, the Foreign Office were content to leave as a question of law to the Court.

Bucknill, J., held that the Nationalist Government was a foreign sovereign State. The Court of Appeal upheld this decision.

On appeal to the House of Lords, it was argued (1) The Nationalist Government was not a foreign sovereign State. There had merely been a recognition of insurgency. A State is and becomes an international person through recognition only and exclusively (Oppenheim i, 119, 5th ed.). (2) The Nationalist Government was not impleaded because it had never been in possession of the ship.

Judgment.] The Court held that there was no doubt that the Nationalist Government was in fact in possession of the ship. That being so, the Foreign Office letter disposed of the controversy. Exercising *de facto* administrative control, or exercising effective administrative control, means exercising all the functions of a sovereign government in maintaining law and order, instituting and maintaining sovereign Courts of justice, adopting or imposing laws. It implies the ownership and control of property, including ships. In these circumstances the recognition of a government as possessing all those attributes in a territory, while not subordinate to any other government, was to recognise it as sovereign, and for the purpose of international law as a foreign sovereign State. The present case dealt with a legislative decree affecting merchant ships registered at Bilbao in the Basque Provinces, the territory specially mentioned in the letter. The decree emanated from the sovereign in that territory. For the purposes of the case, there was no difference between recognition of a State *de facto* as opposed to *de jure*. All the reasons for immunity which are the basis of the doctrine of international law, as incorporated into our law, were in existence. There was the same necessity for reciprocal rights of immunity, the same feeling of injured pride if jurisdiction is sought to be exercised, the same risk of belligerent action if government property is seized or injured. The non-belligerent State which recognises two governments, one *de jure* and one *de facto*, will not allow them to transfer their quarrels to the area of the jurisdiction of its municipal Courts.

The Nationalist Government of Spain was a foreign sovereign State and could nc

This case may be contrasted with the case of *The Cristina*, [1938] A. C. 485, *infra*, p. 96, in which the claim of the Spanish Republican Government was upheld. Both cases turn, not on the legality or otherwise of foreign requisitioning orders, but on the fact that the ship in dispute was in possession of a foreign sovereign State. Once such a possession is proved neither British Courts nor those of the United States (q) hold themselves entitled to inquire into the legality of that possession if such inquiry would result in impleading a foreign sovereign State. The European political complications created by the Civil War in Spain brought before the Courts of various countries a

(q) *The Exchange v. McFaddon*, 7 Crouch. 116 *infra*, p. 278

number of problems touching on the question of recognition (r). The Nationalist Forces starting as mere insurgents gradually established a position as the effective Government of Spain. Political sympathies played a not inconsiderable part in the attitude adopted by outside Powers—the policy of Germany and Italy inclining them to the fullest recognition of the position of General Franco at the earliest moment that it could reasonably be asserted that his authority was firmly established; whereas Russia and France on the other hand desired to give no encouragement whatever to the Nationalist Movement, even when it had gained control of the larger part of Spain. The British Government sought to preserve an impartial attitude in the struggle which laid itself open to criticism from both Right and Left Wing political enthusiasts. An attempt was made to use the question of recognition of belligerency as a bargaining factor to secure the withdrawal of foreign volunteers from Spain, and recognition of the facts of the position was only gradually and in appearance somewhat grudgingly given. At the time of the decision of the case of *The Arantzazu Mendi*, the British Foreign Office were prepared to say that it still recognised the Republican Government as *de jure* Government of Spain, but that it also recognised the Nationalists as in fact in control of a large part of Spain, including the home port of the ship. The British Government did not state positively that it recognised the Nationalists as the *de facto* sovereign Power at Bilbao, but set out certain facts which the Court held to amount to recognition as a *de facto* sovereign State, and that as such any property actually in its possession must be held immune from the process of British courts, even in proceedings started by the *de jure* Government of Spain; cf. also *Haile Selassie v. Cable and Wireless, Ltd.* (*infra*).

De facto recognition having been accorded to the Nationalist Government, it was held that as regards property in its actual possession it was in the same position as a Government recognised as a *de jure* Government, and was hence immune from the jurisdiction of British Courts.

HAILE SELASSIE v. CABLE AND WIRELESS, LTD. (No. 1)

107 L. J. Ch. 380: [1938] Ch. 345, 639: A. D. 1938–40, No. 67.

HAILE Selassie, ex-Emperor of Ethiopia, appealed to the Court of Appeal against a decision of Bennett, J., in the Chancery Division of the High Court, which had dismissed his action against Cable and Wireless, Ltd., on the ground that it

(r) The chief facts, and information as to other literature on the subject, can be conveniently found in Padelford, *International Law and Diplomacy during the Spanish Civil Strife*, 1939.

impleaded directly or indirectly a sovereign State, the Kingdom of Italy.

Cable and Wireless, Ltd., prior to the Italian conquest of Ethiopia, had been engaged in the running of a radio telegraphic service between Great Britain and Ethiopia, and in respect of this owed a sum of money to the Empire of Ethiopia. After the conquest had taken place, Haile Selassie claimed this money, but the company, having been informed that the Italian Government also considered that they were entitled to payment, refused to pay, pending a judicial decision as to who was lawfully entitled to payment. The Italian Government declined to allow itself to be made a party to interpleader proceedings in an English Court, and the action therefore proceeded as one against the company only.

Judgment.] The Court held that the Italian Government was neither a party nor a necessary party to the action. The claim was one against a private individual, not a sovereign State, and the fact that the Italian Government was not a private person who could have been joined in interpleader proceedings did not deprive the plaintiff of his claim. The Courts of this country are not competent to entertain an action which directly or indirectly impleads a foreign sovereign State. If property situated in England is shown to belong to or to be in the possession of an independent foreign Sovereign or his agent, the Courts must reject a claim which seeks to interfere with his title or deprive him of possession. The rule applies both to actions *in personem* and to actions *in rem*. But it has never been extended beyond cases where it was sought to bring either the Sovereign or his agent before the Court, and where the judgment would interfere with proprietary or possessory rights. It would be strange if a plaintiff were to be deprived of his rights against another private person in this country merely because a claim to the property had been put forward on behalf of a foreign Sovereign. An independent Sovereign sued for breach of promise of marriage can claim to be outside our jurisdiction, but there is no authority for the view that if he wrongfully obtained possession of valuable jewellery in this country, and it was in the hands of a third person, he could claim to stay proceedings by the rightful owner against that person merely by stating that he claimed it. He would be

bound to prove his title. The plaintiff's claim must therefore succeed, and the action remitted to the Chancery Division.

HAILE SELASSIE v. CABLE AND WIRELESS, LTD.
(No. 2)

107 L. J. Ch. 419; [1939] Ch. 182; A. D. 1938-40, Case No. 37.

IN December, 1936, Great Britain recognised the Government of Italy as the *de facto* Government of Ethiopia. At the time of the bringing of this second action on the same facts as above, a Foreign Office letter was received by the Court stating that His Majesty's Government still recognised the plaintiff as *de jure* Emperor of Ethiopia, but recognised the Italian Government as the Government *de facto* of virtually the whole of Ethiopia.)

Bennett, J., after considering a number of previous decisions cited before him, such as *U.S.A. v. McRae*, L. R. 8 Eq. 69, *infra*, p. 78, *Luther v. Sagar*, [1921] 3 K. B. 532, *infra*, p. 65, and *Bank of Ethiopia v. National Bank of Egypt and Liguori*, [1937] Ch. 517, held that the principle of those cases was that English Courts will recognise and give effect to the acts of the *de facto* ruler in relation to persons and property in the governed territory, and will treat the acts of the *de jure* Government as a nullity. The case he had to decide was not covered by these authorities. It was a case of a debt recoverable in England—the title to a chose in action—it was not concerned with the validity of acts in relation to persons or property in Ethiopia. Had the plaintiff, who was recognised by His Majesty's Government as Emperor *de jure* of Ethiopia, lost the right to recover the debt in a suit in England because his country had been conquered by Italy and His Majesty's Government recognised that the greater part of Ethiopia was ruled by Italy? Bennett, J., held that he had not.

Before the appeal came on for decision, however, the British Government had recognised the King of Italy as *de jure* Emperor of Ethiopia. The Court of Appeal held that this had entirely changed the position, and it was no longer necessary to consider the correctness or otherwise of the judgment of the Chancery Division. By the recognition of Italy as the *de jure*

ruler of the country, the title of the plaintiff to sue had been necessarily displaced, and the judgment in favour of Haile Selassie must therefore be reversed.

This action, though it concerned property to which two rival foreign Governments laid claim, did not directly implead a sovereign State. The property in question was not in the actual possession of a foreign Sovereign, but was a chose in action—a debt owed by a company in England to the Sovereign of Ethiopia. The decision in Case No. 1 turned on the immunity from suit of foreign Sovereign, which the Court of Appeal held not to cover a claim for the recovery of a debt from a private individual, to which such Sovereign also laid claim.

In Case No. 2 the primary question before the lower Court was the question of title to sue for recovery of a debt owed to a State as between the Government *de jure* and that recognised as in *de facto* control of the territory. Bennett, J., accepted the position laid down in earlier cases (see also *The Arantzazu Mendi*, *infra*, p. 59, and *Banco de Bilbao v. Sancha and Rey*, [1938] 2 K. B. 176), that as regards persons and property in the territory it is the acts of the *de facto* Government which will be treated as valid. But he held that conquest of a territory together with *de facto* recognition of that fact by the British Government did not divest the title of the ruler still recognised as *de jure* ruler to sue for the debt. In his view conquest alone did not transfer the right to sue, from the *de jure* to the *de facto* ruler. This point whether *de facto* recognition deprives the ruler recognised *de jure* of his right to sue for a State debt it was not necessary to reconsider in the Court of Appeal, for by the time of the final hearing *de jure* recognition of the King of Italy had been accorded, and it was admitted that a former ruler who was now recognised as neither *de facto* nor *de jure* ruler of Ethiopia had no claim to a debt owed to the State of that country.

LUTHER v. SAGOR

90 L. J. K. B. 1202; [1921] 3 K. B. 532, C. A.

THE defendant company, a firm in England, James Sagor & Co., had bought in August, 1920, from the Russian Commercial Delegation to Great Britain, acting on behalf of the Soviet Government, a quantity of plywood. On arrival of the goods, the trade marks thereon showed the wood to have been formerly the property of the A. M. Luther Co., a company incorporated in the Empire of Russia, with a factory at Staraja Russa in Russian territory for the manufacture of veneer or plywood.

In 1918 the Russian Socialist Federal Soviet Republic had passed a decree declaring woodworking establishments, such as the plaintiff's, the property of the Republic, and in 1919 the plaintiff's factories were seized by the Soviet Government. Under these circumstances, the latter company claimed the wood in the possession of Sagor as their property.

✓ The contention of the (plaintiffs) was that the so-called Republican Government which had seized the goods had had no real existence as a Government, that it had never been recognised by His Majesty's Government, and that the seizure of the goods was pure robbery. As an alternative they contended that the decree of the so-called Government nationalising all factories was not a decree which English Courts would recognise or enforce.

The (defendants), on the contrary, contended that the Republican Government which passed the decree was the de facto Government of Russia at the time, and had been recognised as such by His Majesty's Government, and that the decree was one to which English Courts could not refuse recognition. They relied also on the treaty of peace between Esthonia and Russia, under which they alleged that the plaintiffs became an Esthonian company, entitled to bring their complaint before a special commission only. Roche, J., found for the plaintiffs.

Judgment.] On appeal the Court of Appeal held that, though on the facts as they were before him at the time Roche, J., was right in his decision, there had since been a change in the position. In March, 1921, the British Government had concluded a trade agreement with the Soviet Government, and the Foreign Secretary therefore stated in April, 1921, in reply to the appellants' solicitors' request for information, that the British Government recognised the Soviet Government as the de facto Government of Russia. Under these circumstances the whole aspect of the case was changed. It was necessary to consider what was the effect of the recognition by His Majesty's Government in April, 1921, of the Soviet Government as the *de facto* Government of Russia, upon the past acts of that Government, and how far back, if at all, does recognition extend. Further, was the Soviet Government now recognised the same Government as that which effected the seizure? No distinction, for the purposes of this case, existed between recognition of a

Government *de jure* and recognition of a Government *de facto*. The British Government having recognised the Soviet Government as the Government really in possession of the powers of sovereignty in Russia, the acts of that Government must be treated by the Courts with all the respect due to the acts of a duly recognised sovereign State. The Court was satisfied that the Government recognised was the same as that which made the seizure of the goods. The claim of the plaintiffs to have remained the owners of the goods therefore failed.

The chief point decided by the Court of Appeal in this case is that when the Government has recognised a foreign Government as the *de facto* ruler of a foreign territory, English law will treat the acts of the *de facto* Government in that territory as valid and entitled to the respect due to the acts of a duly recognised foreign sovereign State. The same principles of English law that were applied in the cases concerning the recognition of Soviet Russia came up for consideration in relation to the Civil War in Spain, 1936-1939. Thus in the *Banco de Bilbao v. Sancha and Rey*, [1938] 2 K. B. 176. The point at issue before the Court of Appeal was as to who had the right to control the London Branch of the Bank of Bilbao. The Basque Government (Republican), before losing control at Bilbao, had passed certain decrees appointing a new board of directors for the bank, whose agent was claiming to take over its London branch. It appeared, however, that those decrees were irregular under Spanish law, and it was not until after the conquest of Bilbao and most of the Basque province by General Franco's forces, while the case was pending before the Court of Appeal, that the Spanish Republican Government passed legislation validating the decrees of the Basque Government. The Foreign Office stated that Britain recognised the Nationalists as in *de facto* control of Bilbao, but the Republicans as *de jure* Government of the whole of Spain. The law the Court had to apply in this case was the law of the place of the control and it held that the law of the Government in *de facto* control prevailed. The Court, said Clauson, L.J., is bound to treat the acts of the Government recognised as the *de facto* Government of the area in question as acts which cannot be impugned as acts of a usurping Government, and conversely the acts of a rival Government claiming jurisdiction over the same area must be treated as a mere nullity, even if the latter be recognised by Britain as the *de jure* Government of the area.

LAZARD BROS. v. MIDLAND BANK, LTD.

102 L. J. K. B. 191; [1933] A. C. 289.

BEFORE the Russian Revolution of October, 1917, the Midland Bank in London owed the Moscow Industrial Bank, incorporated in Russia, a large sum of money. The Moscow Industrial Bank owed money to Lazard Bros. Between October, 1917, and August, 1921, decrees were passed by the Soviet Government nationalising and liquidating all banking corporations in Russia. In October, 1930, Lazard Bros., after following procedure laid down by the rules of the Supreme Court under Order IX, r. 2, for service of the writ by registered post on foreign corporations resident abroad, obtained judgment by default against the Moscow Bank and a garnishee order *nisi* against the Midland Bank attaching debts due from the Midland Bank to the Moscow Bank. The Court of Appeal set aside both judgment by default and garnishee order *nisi* on the ground that at the time they were obtained the Moscow Bank had ceased to exist.

Judgment.] The House of Lords upheld the decision of the Court of Appeal. Lord Wright, delivering the judgment of the House, held that the most important and decisive question was whether the judgment and order should be set aside on the ground that they had been signed against a non-existent defendant, since the Industrial Bank had ceased to exist as a juristic person before the date of the writ. If the judgment debtor was in fact non-existent, at all material times at the date of the writ and subsequently, it was clear law that the judgment must be set aside as a nullity. English Courts have long since recognised as juristic persons corporations established by foreign law in virtue of the fact of their creation and continuance under and by that law. But the will of the sovereign authority which created can also destroy. English law will equally recognise both facts. The Industrial Bank was established by the Tsar's Government, but the Government of Russia recognised in English Courts since 1917 is that of the Soviet State.

The Soviet Government was recognised in 1921 as the *de facto*, and in 1924 as the *de jure* Government of Russia. The effect of such recognition was retroactive, and dated back to the original revolution of 1917. At the time of the issue of the writ in 1930, the question was whether by Soviet law the Industrial

Bank was a juristic person. Examining that law as it must be examined as a question of fact with the aid of expert witnesses, Lord Wright pointed out that the evidence as to Russian law put before the Court differed greatly from that on which the House of Lords had decided the case of *The Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A. C. 112. In any case, the position in 1920 was not what it was in 1930, and the dissolution of the Russian Bank took place long before October, 1930. On this ground alone, the writ, the judgment, and the garnishee proceedings must be set aside. He held further that the procedure used as regards service of the writ was irregular (s).

**RUSSIAN COMMERCIAL AND INDUSTRIAL BANK v.
COMPTOIR D'ESCOMPTE DE MULHOUSE AND OTHERS**

93 L. J. K. B. 1084; [1925] A. C. 112.

THE Russian Commercial and Industrial Bank, a Russian corporation having its head office in Petrograd, deposited in 1914 through its London branch certain foreign bonds as security, to be held on the account of the Comptoir d'Escompte de Mulhouse, which at the time of the action brought was a French bank. From 1917 to 1920 the Soviet Government by a series of decrees confiscated the assets and took over the management of all private banks. Correspondence took place between the London branch of the Russian bank and the French bank, and the London branch paid the French bank an agreed sum of about 1,000,000 marks as owed to them. The plaintiffs' London branch then applied to the London bank for the delivery up of the security. This was refused on the ground that the power of the London branch manager to give a valid receipt for the bonds was doubtful.

Sankey, J., held that the powers of the London branch manager had lapsed, and gave judgment for the defendants. The Russian bank appealed.

Held by the Court of Appeal (Atkin, L.J., dissenting) that, in

(s) Proceedings should have been under Order XI, r. 8. Order IX. r. 2. was not applicable.

consequence of the Soviet decree, the Russian bank had ceased to exist, its London branch was therefore extinguished and the manager had no capacity to sue.

Judgment.] On appeal to the House of Lords, the decision of the Court of Appeal was reversed. On examination of the series of decrees of the Soviet Government with the aid of witnesses expert in Russian law, it was held that their effect was not to extinguish the Russian bank. It might not be an agreeable task for a British Court to consider the effect of confiscatory legislation of this nature. But the Soviet Government had been recognised by Great Britain as the lawful Government of Russia, and thus its decrees must be treated as binding as far as the jurisdiction of the Russian Government extends.

A number of cases have arisen in the Courts of various countries proceeding from the nationalisation and dissolution of private corporations in Russia under the Soviet regime. The principle accepted by the British House of Lords in *Lazard v. The Midland Bank* was that already decided in the *Russian Commercial and Industrial Bank v. Comptoir d'Escompte de Mulhouse*, [1925] A. C. 112, that as the Soviet Government had been recognised by Britain as the lawful Government of Russia, its decrees must be treated as binding as far as the jurisdiction of the Russian Government extended (*t*).

Recognition.—The birth of a State is a historical fact and not a legal fact (*u*). A new State may come into existence in various ways. But it is only by virtue of its recognition by States already members of the family of nations that a State becomes fully a member of that family. "Recognition does not create the State. It simply gives to a *de facto* State an international status" (*a*). Thus in 1932

(*t*) See also *Russian and English Bank v. Baring Bros.*, [1932] 1 Ch. 435; *Re Russian and English Bank*, [1932] 1 Ch. 663; *Russian and English Bank v. Baring Bros.*, [1935] 1 Ch. 120 (C. A.); *The Jupiter*, No. 3, *infra*, p. 98. But as confiscatory decrees purporting to operate on property not within the jurisdiction at the time will not necessarily be respected, e.g., *El Condado*, No. 2, A. D. 1939, No. 77; *Etat Russe v. Cie Ropit*, Court of Aix, 1925, A. D. 1925-6, No. 17; *Forsikringsaktieselskapet Norske Atlas v. Sundén-Culberg* (Sweden), A. D. 1929-30, No. 61.

(*u*) Stupp, *Elements*, I, 80.

(*a*) *Salimoff v. Standard Oil Co. of New York*, Annual Digest, 1933-4, Case No. 8. *Wulfsohn v. Russian Socialist Federated Soviet Republic*, Annual Digest, 1923-4, Case No. 16.

Iraq, having reached a stage in its development at which it was generally agreed that it should cease to be territory under Mandate, was recognised by members of the League of Nations as a fully sovereign State and admitted to the League. Often, however, it is violent change occasioned by revolution which gives rise to problems as to recognition. The initial stages of a revolt against an established Government may give rise to problems as to the recognition of insurgency or belligerency (*infra* p. 57) as was the case in 1936 with regard to the civil war in Spain. If a definite portion of the territory of a State succeeds in throwing off the authority of the State which formerly governed it, there may be a question as to at what stage recognition may be given by third States to the changed facts. In the course of a civil war, moreover, questions may arise, as in cases illustrated above, as to what effect is to be given in foreign countries to the acts or the legislation of rival authorities.

Questions of recognition may also come under consideration when a Government of a recognised State is swept away by a revolution, such as the revolution in Russia which has effected profound changes in the whole structure of the State. Here the question is whether recognition of the change of Government should be given.

With regard to recognition of a State as a condition of membership of the family of nations the dominant doctrine of the jurists is that once a community has reached a position of an independent State in fact, it is at the option of each member State of that family to give or to refuse recognition. Not all writers, however, are agreed on this point. Many consider that once a community has arrived at a certain stage of development and stability it is entitled to be recognised by others as what it is in fact. And though the practice with regard to recognition appears to turn to some extent on political rather than legal considerations it will be found that circumstances will ultimately force recognition of undoubted facts. With States as with individuals, even if one dislikes one's neighbours, it may in the long run be neither practicable nor politic wholly to ignore their existence or to treat them as other than what they are in fact. It may be difficult to prove the acceptance in practice of a legal right to recognition yet in according or withholding recognition the practice of States is not wholly arbitrary or governed solely by their own political interests (Oppenheim, I, 118-127).

The intercourse between States being carried on between Governments, non recognition of a new Government will entail many of the consequences of non recognition of the State. In the case of recognition of new Governments the distinction between *de jure* and *de facto* recognition mentioned in the cases above has figured prominently. Where there are two rival Governments, each controlling a large area of territory as occurred for a period during the Spanish Civil War, it may well be difficult for third States who may not consider themselves entitled to transfer full recognition to a new Government not yet in full and secure enjoyment of complete independence to refuse to

recognise the acts of that Government as a Government in actual effective control of the territory. In Haile Selassie's case, too, the Emperor of Ethiopia had been ejected from his throne by Italy in open violation of the promises given in the Covenant of the League of Nations. Other League members might be unwilling to take effective steps to protect the Covenants of the League, but they were entitled to express their disapproval by withholding recognition of the new Government.

In the case of the Russian Revolution, differences in ideals, and the presence of militant propaganda deemed injurious to themselves by foreign States, delayed recognition of the Soviet Government. The U.S.A. did not accord such recognition until 1933. It is in this type of situation where for some reason there is delay in according full *de jure* recognition, that room may arise for *de facto* recognition of the new Government or of its acts and legislation.

The first consequence of recognition both of a new State and a new Government recognised as *de jure* Government will usually be the entry into being of normal diplomatic relations. It will render possible the effective operation of such treaties the validity of which has remained unaffected by the change in circumstances. In certain cases it may involve a right of action in the Courts of the recognising State which it did not formerly possess. (Oppenheim, I. p. 132.) Immunities from jurisdiction in the law Courts of the recognising State attach on recognition—in English law at any rate this consequence follows from a mere *de facto* recognition, provided that it amount to recognition of the *de facto* Government as a foreign sovereign State. (*The Arantzazu Mendi*, *infra*, p. 59.) The new State or Government is entitled to obtain possession of property belonging to its predecessor at the time of the change, which is situated in the recognising State. Laws and executive acts of the new Government become entitled to be treated in the Courts of law of the recognising State as from the date of its establishment in effective power with the respect due to the acts of a foreign sovereign State.

This does not necessarily mean that every legislative or executive act of a foreign State will be treated as enforceable outside its own exclusive sphere of jurisdiction. A Government such as that of Germany under the Nazi regime may well enact legislation that is wholly repugnant to the conscience of its neighbours, and there is neither international law nor comity that should compel the Courts of one State to violate its own ideals of justice in order to enforce the legislation of a foreign State. There is, therefore, a general hesitation among States to allow their Courts to enforce the penal or confiscatory legislation of foreign Powers, or, at any rate, to limit the recognition of such legislation to acts taking place within the territorial jurisdiction of the enacting Power (b).

(b) Amongst the many cases in recent years bearing on this topic are *Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of*

SUCCESSION IN INTERNATIONAL LAW

THE UNITED STATES OF AMERICA v. McRAE

(1869), L. R. 8 Eq. 69.

DURING the American Civil War the Confederate Government and their agents had consigned goods and remitted money to the defendant, who was apparently domiciled in England. The defendant having sold the goods and received the sale moneys, a suit for an account was instituted against him by the United States Government, after the dissolution of the Southern Confederacy, in the English Courts. The defendant put in no answer, and simply left the plaintiffs to make out their own title to relief. James, V.-C., asked if the plaintiffs were willing to have the account taken as it would be taken between the Confederate Government, on the one hand, and the defendant, on the other; but the plaintiffs declined to accept the decree in any form which would recognise the authority of the belligerent States or involve any privity with their agent. In view of this the suit was dismissed with costs.

Judgment.] The Vice-Chancellor, in giving judgment, stated that he would deal with the case as if the plaintiffs had been the Government of India, and the defendant an agent of insurrectionists there. What was at the outbreak of the rebellion the public property of the plaintiffs would still continue their property, and if at the end of the rebellion any such property capable of being identified could be traced to any person, the rightful owners would be entitled to apply for restitution. But moneys voluntarily contributed to the rebellion could not be

New York (Russian Banks in U.S.A.), 1930, Annual Digest, 1929-30, No. 20; *Etat Russe v. Cie Ropit*, 1925, A. D. 1925-6, No. 17 (non-recognition of Soviet decrees by French Court as to ships in France at time of confiscatory decree); *Papadoulos v. N.V. Koninklijke Nederlandsche Stoombootmaatschappij of Amsterdam*, A. D. 1925-6, No. 19 (Dutch Court's refusal to enquire into legality of seizure made in Turkey by British military authorities); *Forsikringsaktieselskapet Norske Atlas v. Sundén-Culberg*, A. D. 1929-30, No. 61 (Swedish Supreme Court as regards assets in Sweden will not apply Russian decrees dissolving Russian insurance companies). Also A. D. 1925-6, Nos. 100-102, and 1927-8, Nos. 91-92; *El Condado* (No. 2), 1939, A. D. 1938-40, No. 77; *U.S. v. Belmont*, 301 U.S. (1937) 324; *Bollock's Case*, A. D. 1941-2, No. 36 (confiscatory decree of Vichy Government not enforced in New York); *Wulfsohn v. Russian S.F.S.R.*, A. D. 1923-4, No. 16; *Salimoff v. Standard Oil Co. of New York*, A. D. 1933-4, No. 8; *The Navemar*, 303 U. S. 68; *Lorentzen v. Lyddon and Co., Ltd.*, [1942] 2 K. B. 202; *Tatem v. Gamboa*, [1939] 1 K. B. 132, A. D. 1938-40, No. 31.

recovered as moneys had and received to the use of the lawful Government. With regard to property taken by force from innocent persons, the right of possession would still remain in them. The learned Judge expressed an opinion that it was clear public universal law that any Government *de facto* succeeding another succeeded to all the public property of the displaced Power. Any such public property would, on the success of the new or restored Power, *ipso facto* vest in the latter; and it would have the right to call to account any agent, debtor or accountant to or of the persons who had exercised the authority of the Government. But the right was only a right of succession or of representation; it was not a right paramount, but was derived through the suppressed authority, and could only be enforced in the same way and to the same extent, and subject to the same correlative obligations and rights as if that authority were seeking to enforce it. Assuming this to be true, it was not open to the plaintiffs to claim from the agent and at the same time to repudiate all privity with him and his former principals. The learned Judge expressed himself satisfied that the plaintiffs' claim, as they had framed it, was based on their paramount title to what they alleged to be their own property, in respect of which they sought to treat the possession of the defendant as the possession of the agent of public plunderers, and in this part of the case the proceedings must wholly fail. There was no evidence that any money or goods of the plaintiffs (*i.e.*, of the plaintiffs in their own right, as distinguished from their right as successors of the Government which had been suppressed) had ever reached the hands of the defendant, or that there were in his hands on or after the suppression of the rebellion any public moneys or goods which had become vested in the plaintiffs.

If, following what is conceived to be the true meaning, we substitute the term "State" for the term "Government", for the reason that the Southern Confederacy must, by virtue of its recognition, be deemed to have constituted for the time being a quasi-State in international law (c), then this judgment may be said to embody a fair statement of

104 Although the term "Government" is sometimes used to indicate the "State", yet, so far as external relations are concerned, "the Government" is really only the organ of the State. The question as to how far a State is

the principle of succession, at any rate on its active side. This, shortly, and so far as it finds expression in the terms of the judgment, is—that where one State *de facto* succeeds to another, it succeeds to all the public and proprietary rights of the displaced Power; but that this is not a right paramount but only a right of succession derived through the predecessor in title, and is therefore subject, at any rate as against foreign States or their citizens, to any lawful claims attaching to such rights or property which would have availed against the displaced Power. On its passive side, the doctrine of succession involves, as we shall see, also a succession to obligations, although only to obligations of a certain kind. The case actually before the Court was that of a revolting province which had been recognised by other States as a belligerent, and which had therefore been invested temporarily with some of the attributes of a State. In the result the parent State had re-established its authority. Thereupon it succeeded to all public and proprietary rights previously inherent in the rebel Government, subject, indeed, to any obligations properly incident thereto, but not to any others. The succession in such a case is, therefore, only a “qualified” succession, in the sense of a succession to rights and not to obligations; the reasons for this limitation being the want even of formal privity as between the two Powers, and the fact that it would be contrary to the principle of self-preservation to require the parent State to assume liabilities incurred for the very purpose of promoting its overthrow (*d*). But, both in this and other cases of succession, it needs to be borne in mind that, in English law, claims against the State itself, whether supported by treaty or not, would not be regarded as falling within the cognisance of the municipal Courts. This, it will be remembered, was emphatically laid down in *The West Rand Central Gold Mining Co. v. R.*, [1905] 2 K. B. 391.

In *Cook v. Sprigg*, [1899] A. C. 572, it was held that the grantees of certain concessions made by the ruler of Pondoland could not, upon the annexation of that country by Great Britain, enforce any of the rights and privileges thereby conferred, as against the Crown; on the ground that the annexation was an “act of State”, and that any obligations assumed under any treaty to that effect, whether with the ceding Government or with individuals, were not obligations which municipal Courts could enforce. “It is well settled,” says Lord Simon, in *Hoani Te Heuheu Tukino v. Aotearoa District Maori Board*, [1941] A. C. 308, “that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except so far as they have been incorporated into the municipal law.” Cf. Lord

bound by obligations contracted by a prior Government, not in privity with its present Government, is really a question of agency, and not a question of succession.

(d) On the same principle, in cases of conquest and annexation, the conqueror is not expected to assume liabilities incurred by the conquered State for the purposes of the war. See also *The King of the Two Sicilies v. Wilcoz*, 1 Sim. (N.S.) 301; and *U.S. v. Proleau*, 35 L. J. Ch. 7.

Dunedin in *Vajesingji Joravasingji v. Secretary of State for India*, [1924] L. R. 51 I. A. 357.

With *U.S. v. McRae* may be compared *Haile Selassie v. Cable and Wireless, Ltd.* (No. 2), Annual Digest, 1938-40, Case No. 37, *infra*, p. 64.

The doctrine of succession also carries a right on the part of the new state to the allegiance of those who were formerly subjects of the displaced Power. Such persons may, indeed, in the case of cession or conquest, avoid the consequences of such allegiance by migration, and such a right is frequently conferred by treaty; but if they stay in the conquered or ceded territory they will be deemed to have elected to become the subjects of the new Government. So in *Re Bruce* (1 L. J. (N.S.) Exch. 153) the Court, dealing with the case of a person who was born in Maryland, of parents there domiciled, before the separation of the American colonies, and who after a long intermediate residence in foreign countries returned to America and died there, observed: "The plaintiff, upon the treaty between this country and the United States, had the option of continuing a British subject if he should elect Great Britain as his country, or of ceasing to be a British subject and becoming to all intents and purposes an American; and it seems to us that he made his election to the latter" (e).

The Doctrine of Succession in International Law.—This doctrine applies in cases where one State takes the place of another, either partly or wholly, and by virtue of this is deemed to succeed to such of the rights and obligations of the prior State as are, in the circumstances, recognised by usage and the reason of the thing as transmissible. The question here, it will be observed, is not a question of succession as between two forms of government representing the same State, which is really a question of representation (f), but a question of succession as between States, or as between one State and a part of another. With respect to the general character of the rights and obligations which pass by succession, these may relate either to the territory itself, or the allegiance of its inhabitants, or the prerogatives and property of the displaced Power, although this is for the most part a question only important in municipal law; or they may be rights or obligations arising out of certain kinds of treaties, concessions, or contracts previously made by that Power, or relating to its public debts. With respect to the different forms of succession, it has already been

(e) See also *Doe d. Thomas v. Acklam*, 2 B. & C. 779; *Jephson v. Riera*, 3 Knapp, P. C. 130; and *Doe d. Stansbury v. Arkwright*, 5 C. & P. 575; and as to other aspects of succession in municipal law, *U.S. v. Smith*, 1 Hughes, R. 347; *U.S. v. Percheman*, 7 Peters 51; Scott, p. 136.

(f) See *The Sapphire*, 11 Wall. 164.

pointed out that, in the case of a revolting province over which the parent State establishes its authority, the succession is only a "qualified" succession in the sense of a succession to rights and not to obligations. Other cases of succession, which involve a transmission of obligations as well as of rights, may be roughly grouped under two heads: (i) cases where a part of one State is severed from the parent stock, and either becomes independent or is incorporated in another State, which we may designate, shortly, as cases of "partial succession"; and (ii) cases where an entire State is absorbed by some other State or by a union of States, which, for want of a better term, we may perhaps designate as cases of "universal succession" (g). It is, however, necessary to remember that although a doctrine of succession is undoubtedly recognised for some purposes, both in the practice of States and in the decisions of municipal tribunals in cases falling within their competence, yet it is not a subject which, so far, can be said to be governed by settled rules; for the reason that the arrangements made on this subject between States are commonly dictated by considerations which are in the main political rather than legal. Nor, indeed, can any settled rules be deduced from the writings of the publicists (h). All that can be done, therefore, is to consider some of the more prominent cases in which the question is likely to arise, and to suggest a few rules of general application, which appear to be at once warrantable in principle and not devoid of some measure of authority as regards opinion and practice.

(i) "*Partial*" Succession.—A partial succession may occur either (1) as the result of secession; or (2) upon the cession by one State of part of its territory to another State; or (3) upon the dismemberment of an existing State in such a way that its previous identity is lost. And although these cases would appear to be governed by very similar principles, it will be convenient to consider them separately.

(1) *Secession*.—The first case is that in which a province secedes from the parent State and establishes its independence; as occurred when the United States of America separated from Great Britain. In such a case, in default of treaty, or in so far as the provisions of any treaty may not extend, the governing rules would appear to be these:

(g) This term is, in some respects, scarcely appropriate; for the reason that the succession in such cases is more limited than in cases of "universal succession" proper, and the distinction between it and "partial succession" although there is a distinction, is less clearly marked. It has been suggested that it would be more in keeping with modern practice to assume, instead of a law of "universal succession", a law of "singular succession" to rights only, and to such only as can be enforced in the courts of the successor; see *Theory of State Succession* (1907), by A. B. Keith.

(h) Hall, 116 n. A. B. Keith's *Wheaton*, 6th ed., pp. 61-79. Oppenheim, i. pp. 146-155, which, while not indorsing Professor Keith's opinion that the practice on the matter is governed almost solely by political rather than legal considerations, admits that practice has hardly settled more than general principles.

The new State will succeed to such territory as it has won (*i*), together with all attendant rights; but the latter will not include privileges which formerly belonged to its inhabitants over or in relation to other parts of the territory of the parent State (*k*). It will succeed also to all the sovereign rights and prerogatives of the parent State in relation both to the territory so acquired and its inhabitants; including a right to the allegiance of such of the latter as choose to remain, although in modern practice a right of election is sometimes conceded, —as occurred in July, 1899, when, on the secession of Cuba from Spain, a registration was opened for Spaniards who desired to retain the Spanish character. It will succeed also to all the public domain and other public property and assets of the parent State within the territory acquired. On the other hand, the new State will be bound by the sovereign acts of its predecessor done prior to, although not by those done after, severance (*l*). It will become liable for all debts locally connected with such territory; such as debts charged on local revenues, or on revenues derived from property situated within the territory—at any rate, to the extent of the security involved. It will also succeed to other civil obligations of a local kind, such as guarantees and concessions; but not to obligations arising under contracts personal to the former State, or obligations arising out of torts. With respect to the general debt of the parent State, the new State will not incur any legal liability, except by special arrangement. Such arrangements have, however, sometimes been made. So, in 1839 Belgium took over a part of the Netherlands debt; whilst in 1878 Serbia, Montenegro, and Bulgaria were saddled with part of the Turkish debt. By the Peace Treaty of Lausanne, 1912, whereby Italy acquired Tripoli, Italy assumed part of the debt. So, too, the territories ceded by the Central Powers have taken over their pre-war debts, with the exception of the pre-war debt of Alsace-Lorraine. These are, however, rather equitable settlements, since no rule of international law can be said to exist, although many writers maintain the contrary. But in 1898 the United States expressly prohibited Cuba from assuming liability for any debts incurred under Spanish rule—debts incurred by Spain in the unsuccessful attempt to retain possession and charged upon the island. Upon the secession of Panama in 1909, Colombia agreed to recognise her independence on receiving £500,000, as Panama's share of the Colombian debt. At the same time, if the disruption were of such a kind as to affect seriously the financial stability of the parent State, a complete repudiation of all responsibility as regards the general debt of the latter might, if foreign interests were largely involved, arouse some opposition on the part of States whose subjects were affected (*m*). With respect

(*i*) As to the question of boundaries in such a case, see Hall, 115 *et seq.*

(*k*) Hall, 114.

(*l*) Wharton, Dig. i. §§ 5 and 6; Moore, Dig. i. §§ 96-99.

(*m*) Thus on the same principle as that which gave rise to the protest of the United States, upon the acquisition by Chili of the Peruvian guano-beds; see Wharton, Dig. i. 348. See also, on this subject, Feilchenfeld, Public Debts and State Succession, 1931.

to the treaty rights and obligations of the parent State, the new State will not, of course, be entitled or liable under any personal treaties, such as treaties of alliance, arbitration, or commerce, but it will succeed to rights and obligations under treaties specifically relating to territory comprised within its limits, such as treaties of cession, or treaties relating to boundaries or regulating the navigation of rivers (n).

(2) *Cession of Territory*.—In the case where a part of one State is ceded to or acquired by another State, whether as the result of the pressure of war or by voluntary arrangement, the question of succession will commonly be provided for by treaty; but in default of treaty, or in so far as its provisions may not extend, it would seem that the rights and obligations of the transferee State, in the matter of succession, will be governed by rules similar to those set forth above. So in 1859 on the cession of Lombardy, and in 1866 on the cession of Venetia, by Austria to Italy, the latter Power assumed all liability for the local debts of the ceded provinces. But here again, if the cession were such as to impair seriously the financial resources of the ceding Power, the claim to some arrangement with respect to the general debt would probably be even stronger than in cases of secession. Hence, in 1866, after the cession of Schleswig-Holstein by Denmark, Prussia agreed to assume such an amount of the general debt of Denmark as was proportionate to the population of the ceded provinces. In 1866 Italy also assumed a proportion of the general Papal debt based on the revenues of the territory which she had appropriated. But, in 1871, Germany, on the cession of Alsace-Lorraine, refused to take upon herself any part of the French national debt. Nor, in 1878, did Russia assume any part of the general Turkish debt, in respect of territory then acquired by her (o).

(3) *Dismemberment*.—Again, in the case where a State is dismembered in such a way that its identity is wholly extinguished, whether by the creation of new States or by the absorption of its different parts by other States, the same principles would seem to apply to the succession of the new States, or of the acquiring States, as the case may be; subject, however, in this case, to a still stronger claim on the part of foreign States or their subjects for a rateable division of the general debt of the extinguished State.

(11) “*Universal*” *Succession*.—The merger of one State, in its entirety, in another State may occur in various ways (1) It may arise out of the union of two or more States, formerly independent, in such a way as to form an entirely new State; as occurred in 1871, when the German States (p) united to form the German Empire. (2) It may

(n) Hall, 115.

(o) Although this was excused on the ground of its being regarded as a partial set off against the claim for a war indemnity.

(p) Including several States not previously forming part of the North German Confederation.

arise out of the peaceful absorption of one State by another State, or by a union of States, as occurred in 1845, when the republic of Texas was admitted as a member of the American Union (3) Or, it may arise out of the annexation of one State by another, as the result of conquest, as occurred in 1900 on the incorporation of the South African Republic and the Orange Free State in the British dominions. In such cases the rights and obligations of the successor are usually regulated by the pact of union, or by treaty of cession, or by the terms of peace, as the case may be (q). In default of arrangement, or so far as the same may not extend, the rules previously indicated with respect to succession would seem to apply generally, although with results that appear to differ somewhat according to the organisation of the absorbing State, and subject also to some modification as regards obligations incident to State debts. Thus, (1) if the Government of the absorbing State be a "unified" Government then it will succeed to all the public domain and property, and the prerogative rights of the State absorbed, without qualification. It will also become liable for all civil obligations, including the State debts, whether general or local, and this apparently without regard to the value of the assets received (r). But treaties and political obligations arising therefrom, other than treaties locally connected with the territory of the State absorbed, will come to an end with the extinction of the latter. So on the annexation of Madagascar by France in 1896 it was recognised by other Powers that all commercial treaties must be deemed to have been extinguished. (2) But if the organisation of the absorbing State be that of a "real" or "federal union", under which the internal sovereignty of the constituent States is preserved, then it would seem that the civil rights and obligations of the State absorbed will continue to inhere in the latter, except in so far as the essential conditions of union preclude their retention or fulfilment, in which case such rights and obligations should, to that extent, be deemed to devolve on the Government of the union. At the same time, even where such rights or obligations remain in the State which has been so incorporated, they will become enforceable, in so far as they may affect external relations, only through the Government of the union. Treaties previously made will, except in so far as they are locally connected with the territory of the State absorbed, commonly be extinguished, either by reason of the extinction of the State person, or by reason of their having become incompatible with the terms of union. At the same time even personal treaties, such as extradition treaties, if susceptible of enforcement under the terms of union, and not denounced by the central Government, will, it seems, continue operative. So in *Terlinden v Ames* (184 U S 270) it was held that an extradition treaty made between the United States of America and

(q) Succession in cases of conquest is subject to certain special considerations which will be described in vol. II, *sub nom* "The Effects of Conquest," and in connection with the report of the Transvaal Concessions Commission.

(r) But for a possible exception see Westlake, 1 78

Prussia, prior to the formation of the German Empire, continued operative after the union, for the reason that it was not insusceptible of enforcement under the new conditions, and that it had in fact been officially recognised by the imperial Government (s).

The changes following the First World War, 1914-19, have given rise to many problems in the sphere of private law in the Courts of a number of different countries (t). Thus, in 1936 the Supreme Court of South Africa in the *Verein für Schutzgebietsanleihen E. V. v. Conradie, N. O.* (Annual Digest, 1935-7, Case No. 40) accepted the view of State succession expressed in the *West Rand Gold Mining Co. Case*, and rejected the contention that the territory under Union Mandate remained the same juristic person as the former German South West Africa so as to be liable on German bonds issued for the benefit of, and on security of, South West Africa. On the Continent of Europe the Courts of the Austrian Republic have frequently declined to identify their State with the former Austrian Empire so as to involve it in the obligations of that State: *Austrian Pensions (State Succession) Case*, 1925, Annual Digest, 1925-6, Case No. 25, etc.

The Polish Supreme Court has in general taken the view that Poland took over the rights but not the obligations of the partitioning Powers. See, for example, *Polish State Treasury v. District Community of Suwiecie*, 1929, Annual Digest, 1929-30, Case No. 30.

In matters such as the continuance of treaty rights under the Hague Convention on Civil Procedure, 1905, foreign Courts have been not unwilling to accept the position that they have remained unaffected. Thus, in 1920 the Swiss Court of Appeal of the Canton of Zurich held Hungarian nationals still entitled to rights under the Convention, though it was the former dual monarchy which was the signatory party. In *Re Ungarische Kriegsprodukten Aktiengesellschaft*, Annual Digest, 1919-22, Case No. 45.

A brief survey of recent cases lends some support to the views of Professor Keith and others that where the matter is not covered by special treaty provisions, as will usually be the case in a cession as opposed to the complete conquest of a territory, the actions of the succeeding States are dictated largely, if not wholly, by considerations of what is wisest and most prudent from a political point of view, tempered by regard for general principles of justice.

(s) On the subject of succession generally, see Hall, 114; Westlake, i. 68; Keith's Wheaton, i. pp. 61-79; Oppenheim, i. pp. 146-155.

(t) Annual Digests of Public International Law Cases, 1919-42.

*THE PLENARY REPRESENTATION OF STATES; ORGANS OF
A STATE IN ITS EXTERNAL RELATIONS***THE "SAPPHIRE"**

(1870), 11 Wall. 164; 18 Wall. 51 (u).

ON December 22, 1867, the American ship "Sapphire", a private vessel, came into collision with the French transport "Euryale" in the harbour of San Francisco, in consequence of which the latter vessel sustained considerable damage. Subsequently a libel was filed in the District Court in the name of Napoleon III, Emperor of the French; and as the result of these proceedings the libellant was awarded a sum of \$15,000. This decree was subsequently confirmed by the Circuit Court, and an appeal was then taken to the Supreme Court. The case came on for argument on February 16, 1871, by which time the Emperor Napoleon had ceased to reign. Before the Supreme Court two questions, apart from the question of merits, were raised: (1) as to the right of the Emperor to bring a suit in the United States Courts; and (2) whether the suit, if rightly brought, had not abated by the deposition of the Emperor. In the result it was held: (1) that a foreign Sovereign is entitled to bring a suit in the Courts of the United States; and (2) that a claim arising by virtue of being such Sovereign is not defeated, nor does such suit abate, by a change in the person of the Sovereign. At the same time the Court was of opinion that if a vessel at anchor, during a gale, could avoid a collision threatened by another vessel, and did not adopt the means for doing so, she became a participant in the wrong and must divide the loss with the other vessel; and on this ground the decree of the Circuit Court was reversed, and the case remanded, with a mandate directing a decree in conformity with this opinion.

Judgment.] The judgment of the Supreme Court was delivered by Mr. Justice Bradley. With respect to the first question, it was held that a foreign Sovereign, as well as any other foreign person, having a demand of a civil nature against any person in the United States, was at liberty to prosecute it in the Courts

(u) The latter report only relates to certain questions of Admiralty practice, and does not affect the principles as to the representation of foreign States previously laid down by the Supreme Court.

of that country. There were many examples of such suits in the United States Courts. There were also numerous cases in the English reports, in which suits of foreign Sovereigns had been sustained, although it had been held that a foreign Sovereign could not be forced into Court by suit. On the second question the Court held that the suit had not abated by the recent deposition of the Emperor. The reigning Sovereign represented the national sovereignty, and that sovereignty was continuous and perpetual, residing in the proper successors of the Sovereign for the time being. Napoleon had been the owner of the "Euryale", not as an individual, but as the Sovereign of France; and this was substantially averred in the libel. On his deposition the sovereignty did not change, but merely the person or persons in whom it resided. The foreign State was the true and real owner of its public vessels. The reigning Emperor, or the National Assembly, or other actual person in power, was but the agent or representative of the national sovereignty; and upon any change therein, the next successor was competent to carry on a suit already commenced and to receive the fruits of it. If any substitution of names were necessary or proper, this could be done under the powers of the Court. It was not alleged even that any change in the real ownership of the "Euryale" had occurred by the recent devolution of the sovereign Power. If, in any such case, the vessel really belonged and had always belonged to the French nation, and it could be shown that any injustice to the other party to the suit would be caused by the continuance of the proceedings after the death or deposition of the Sovereign, the Court, in the exercise of its discretionary powers, could make such order as the nature of the case required, in order to prevent such a result.

THE REPUBLIC OF PERU *v.* DREYFUS BROS. & CO.

(1888), 57 L. J. Ch. 536; 38 Ch. D. 348.

IN this case the Republic of Peru sought an injunction to restrain the defendants, a firm carrying on business in France, from taking out of Court certain funds standing to the credit of an action previously brought by them against the Peruvian

Guano Co. under the following circumstances: In 1869 the defendants had entered into a contract with the then Government of Peru for the purchase of a large quantity of guano. In the carrying out of this contract various disputes arose between the parties. In 1879 a revolution took place in Peru, with the result that the existing Government was overthrown and replaced by a dictatorship under Señor Pierola. The new Government was recognised by Great Britain, France and other European States. After Pierola had become dictator, and as the outcome of a long series of negotiations between the new Government and Messrs. Dreyfus, a settlement of the latter's claim under the guano contract was effected; and the terms of the settlement were ratified by a decree of Pierola, as head of the State, with the consent of his council. It was by virtue of this arrangement that the defendants had succeeded in establishing their claim in the English Courts, as against the Peruvian Guano Co., to the proceeds of a large quantity of guano that had been exported from Peru. These proceeds had been paid into Court, and would in the ordinary course of things have been at the disposal of the present defendants. In the meantime, however, the Government of Pierola had itself been overthrown, and the former constitution and Government re-established; whereupon, in 1886, an Act was passed by the Peruvian Legislature rendering nugatory and void all acts previously done by the Government of Pierola, including the settlement which had been come to between Pierola and defendants. In virtue of this law it was now sought by the Peruvian Government to attach the moneys standing to the credit of Messrs. Dreyfus in the action which had been brought by them against the Peruvian Guano Company. The Court, however, found that the defendants were entitled to the moneys in question, holding that where a *de facto* Government had been recognised by a foreign State the subjects of the latter were entitled to deal with the *de facto* Government (as the proper international representative of the State); and that if in such a case the *de facto* Government were itself subsequently displaced, then the new or restored Government was bound by international law to treat such dealings as valid and effectual, and could only claim thereunder such rights as the *de facto* Government could have claimed.

Judgment.] In his judgment Kay, J., pointed out that the question was one to be determined, not by Peruvian law, but by international law. The question virtually was whether the citizens of one State could safely have dealings with the Government of another State which had been recognised by their own Government. If not, then of what value would such recognition be to citizens of the former State? In European countries there had been many instances of usurpations of power, and of the overthrow of one form of Government by another, which had been recognised by Great Britain and other States. When Great Britain recognised the third Emperor of the French, could it be maintained that, if any Englishman had entered into a contract with his Government, the validity of such contract would depend on the law of France as settled by the decree of the Republic which was established in his place? If this were so, then it would follow that no Englishman could safely contract even with the present Government of France, or, indeed, with any existing Government; for such Government was in its turn liable to be displaced by some other Government, which might treat its acts as void. In the present case the law must therefore be taken to be that an Englishman or Frenchman could safely contract with Señor Pierola's Government, if not before, at any rate after, that Government had been recognised by Great Britain and France respectively. That view was borne out by the English decisions, such as *Barclay v. Russell*, 3 Ves. Jun. 424; *The City of Berne v. The Bank of England*, 9 Ves. Jun. 347; and *The United States of America v. McRae*, L. R. 8 Eq. 69; as well as by the decisions of the Supreme Court of the United States, such as *Gelston v. Hoyt*, 3 Wheat. 246, 324. The learned Judge also quoted with approval the statement made by Wheaton (*International Law*, 2nd ed., p. 41) to the effect that transactions duly entered into between a *de facto* Government and foreign States or subjects ought to be recognised as valid by the lawful Government on its restoration to power, notwithstanding that it might consider the prior Government to have been unlawful, and even though it might think fit to pursue some other course with respect to transactions between the *de facto* Government and its own subjects. Even in the case of a rebel Government, which had not been recognised as independent, it had been held that

upon the suppression of the rebellion the parent State could not recover (as against foreign subjects) anything but what the rebel Government could have recovered. Hence it followed in the present case that the existing Government could not recover the proceeds of the cargoes in question unless the Government of Pierola could have done so, and inasmuch as it was clear that the latter could not have recovered them in derogation of its own contract, it was not open to the present Government to do so.

The decision in this case is virtually an application of the same principle as that laid down in the case of *The Sapphire* (*supra*), with the substitution of the term Government for the term Sovereign. It was held, in fact, that any obligations duly entered into by a *de facto* Government—as the recognised organ of the State for the time being—with foreign subjects would be binding on any succeeding Government, even though not in privity with its predecessor. And, although some stress was laid on the previous recognition of the *de facto* Government by the contractors' own Government, as a condition essential to complete safety, it was nevertheless recognised that even where a transaction had been entered into between a foreigner and a rebel Government which had not been recognised as independent, the succeeding Government could not recover from the former anything but what the rebel Government could have recovered.

The same principles appear to apply even if the *de facto* Government has not been recognised by a claimant's own Government, as was held by Taft, arbitrator, under a special treaty between Great Britain and Costa Rica in the case of *The Tinoco Arbitration* (a). In 1917 Frederico Tinoco had overthrown the Government of Costa Rica, and remained in power for more than two years. In 1922 the restored Government passed legislation invalidating all contracts made by the Tinoco regime, and nullifying other measures of Tinoco as regards the issue of certain currency and securities, thereby annulling the rights of the Royal Bank of Canada, and the concessions of a British petroleum company. The British Government had never recognised the Tinoco Government, but such recognition had been accorded by a number of other States, and it claimed that Costa Rica was bound by obligations entered into by a *de facto* Government. The arbitrator held that the Tinoco Government had been the *de facto* Government of Costa Rica for some time in actual and undisputed control. Neither the fact that by the former constitution of Costa Rica it was an unlawful Government, nor the non-recognition by Great Britain barred the claims of

(a) 116 British and Foreign State Papers, p. 438; American Journal of International Law, 1924, p. 147; B. Y. I. L., 1925, pp. 199-204.

British subjects who had contracted with it. The British Government was therefore entitled to present the claims on the footing that, if proved justifiable, the transactions they embodied would be binding on the restored Government of Costa Rica.

The Russian Revolution has afforded illustrations of a similar character. Thus, in *The Lehigh Valley Railroad v. State of Russia*, 1927, 21 F. (2d) 393, Hudson Cases, p. 118, a United States Circuit Court of Appeals considered a claim for damages arising from a loss while in transit on an American railway in 1916 of property belonging to the Imperial Russian Government. The action had been started by the accredited representative of the short-lived Provisional Russian Government, the last Government of Russia recognised in the U.S.A. prior to 1933. It was held that the State of Russia still survived, and that by the decision of the Executive, the financial attaché of the former Russian Embassy was still entitled to the custody in the U.S.A. of any property belonging to the State of Russia.

The External Representation of States.—A State, like a corporation or any other juristic person, can only act through some visible representative. In considering the subject of State representation, however, it is desirable, in the first place, to distinguish the question of the representation of a State in its international relations from the question of its representation for the purposes of suit in foreign Courts, which is for the most part a question of municipal law. Next, it is desirable to distinguish the plenary representation of a State by its Sovereign or Government, for all purposes in the domain of external relations, from its representation by particular agents, such as ambassadors and envoys, for the conduct of some particular business, or in relation to some particular State. Finally, it is desirable to distinguish between the titular headship of a State and the actual controlling authority in its external relations.

The Titular Headship of a State.—Every State has a titular head who represents the State formally in its foreign relations. In monarchical States these functions naturally devolve on the Sovereign or ruler; and in such States the Sovereign is not only the formal representative of the State but all acts of State are commonly done in his name. Such Sovereigns are, in fact, in international law invested with two sets of rights and attributes; the one personal to themselves, although available only so long as they remain sovereign; and the other belonging to the States of which they are the formal representatives. In republics the titular headship of the State may be vested either in a single person, such as the president, as in France prior to 1940, or in a body of persons or council, as in Switzerland. But in the case of republics, acts of State, although done through and, so far as his competence extends, by the titular head, are yet not done in his name,

but in the name of the State itself. As regards both Sovereigns and other titular heads of States, it is usual to notify to other States any change in the titular headship, although such a proceeding is merely a matter of courtesy and convenience.

The "Government" of a State.—In every State there is some person or body which, under the constitution for the time being in force, is entrusted with the control and direction of the policy and action of the State in relation to other States. It is this person or body that controls all subordinate agents, including the Minister immediately charged with the conduct of foreign affairs, as well as those other officers, civil, or military, or diplomatic, who aid in the carrying on of the business of the State in its external relations. The seat of this controlling authority varies, of course, with the constitution of different States. In some States, such as Great Britain, although the Sovereign is technically the controlling authority, yet in practice, taking into account (what Dicey has called) the conventions of the constitution, the real controlling authority is vested in "His Majesty's Government" (b). Even in republics the controlling authority may rest with the titular head of the State for the time being; although more often the titular head only constitutes a member of such controlling body. But wherever this authority may lie, it is only by its action that the State will be bound in its external dealings; the Foreign Minister or Foreign Office being only its accredited agent for certain purposes (c). This body can scarcely be designated as the sovereign body, for the reason that it often is not identical either with the "titular Sovereign", or with that body which is "legally Sovereign". In *The Republic of Peru v. Dreyfus*, as well as in other cases, this body is styled the "Government" of the State; and despite some obvious objections (d) it is perhaps convenient to adopt this as a term of description. We have thus to take count of the "State" itself, which is always the true international person, and sometimes also a juristic person, in municipal law; the "titular head" of the State, who is usually, although not invariably, its formal international representative; and the "Government" of the State, which is sometimes identified with the titular headship and sometimes not, but which in any case we shall take to denote that body which really directs and controls the external relations of the State.

The Recognition of "Governments".—The question of recognition

(b) Although in this, as in other cases, a very circumscribed prerogative is not, perhaps, incompatible with the exercise of considerable personal influence.

(c) It may, in fact, be necessary to ascertain that the body or authority for whom even an accredited agent acts really represents the State in the matter in question.

(d) As that it is somewhat vague and ambiguous; whilst in English law it is not a term of the law and conveys no notion of legal personality: cf. *Sloman v. The Governor and Government of New Zealand*, 1 C. P. D. 563, and *The Colombian Government v. Rothschild*, 1 Sim. 94.

has already been considered so far as relates to the recognition of new States of international law, and the recognition of belligerency. The notification and recognition, as a matter of formal courtesy, of the accession of a new Sovereign or titular head of a State have also been noticed. But, apart from this, changes may occur, whether by revolution or otherwise, in the fundamental organisation of a State, or in the character of its sovereign body, in virtue of which the authority which formerly controlled its external relations is replaced by some other authority not in privity with it; and in such a case the change of Government is usually subject to the recognition of other States. The object of this is to enable other States to judge of the probable stability of the new "Government" before entering into relations with it. Recognition in this case is a matter of discretion; but if the new "Government" maintains its position such recognition cannot long be withheld, for the reason that non-recognition would virtually mean a complete breaking off of diplomatic relations. At the same time, in cases where the prior Government has been displaced under circumstances involving the disapproval of any other State or States, formal diplomatic relations are sometimes suspended, in token of disapproval; although even in this case intercourse is often allowed to continue informally or unofficially.

The question of the status of the Esthonian National Council was raised in *The Gagara*, [1919] P. 95. It was stated by the Attorney-General on behalf of the Foreign Office that His Majesty's Government had recognised the Council as a *de facto* independent Government, and had received an informal diplomatic representative of the Provisional Government. It was held by the Court of Appeal, affirming the decision of Hill, J., that such provisional recognition accorded, for the time being, to the Esthonian National Council the status of a foreign Sovereign.

On the other hand, in *The Lomonosoff*, [1921] P. 97, the Court refused to recognise the Bolsheviks who had overturned the Government of Northern Russia in February, 1920, as a politically organised society. The particular agents of States in their external relations, together with their privileges and immunities, will be considered hereafter (e).

ACTS OF STATE IN INTERNATIONAL LAW

McLEOD'S CASE

[Parl. Papers, 1843, vol. lxi; Wharton, Digest, vol. i. pp. 64 *et seq.*; Moore, International Arbitrations, iii. 2419; Moore, Digest, ii. pp. 24 *et seq.*]

IN January, 1841, a British subject named McLeod was arrested, whilst in the State of New York, on a charge of

(e) See further, under Recognition, pp. 59-72, *supra*.

having been concerned in the murder of one Durfee, a United States citizen. Durfee had been killed in 1838 in the course of an attack which had been made on the "Caroline", under the following circumstances: The "Caroline" was a small passenger steamer carrying the American flag and on the American register; but at the time in question she was in fact in the employment of the Canadian insurgents. The latter, who had armed and organised on American territory, in the neighbourhood of Niagara, were proposing to use the vessel for the purpose of making a descent on British territory. In order to prevent this a British force crossed the river by night, and after a short resistance took possession of the "Caroline", and sent her adrift down the falls of Niagara. It was in the course of this attack that Durfee was killed; and McLeod, who was an officer in the Colonial forces, was one of the assailants.

Controversy.] On McLeod's arrest the British Minister at Washington at once demanded his release, claiming that the destruction of the "Caroline" was a public act, done by persons in Her Majesty's service, acting in obedience to superior orders; and that the responsibility, if any, rested with Her Majesty's Government, and could not, according to the usage of nations, be made a ground of legal proceedings against the individuals concerned, who were bound to obey the authorities appointed by their own Government. The United States Government replied that, as the matter had passed into the hands of the Courts, it was out of its power to release McLeod summarily; and that its action must be confined to using all possible means to secure his liberation at the hands of the Courts, and to seeing that no sentence improperly passed upon him was executed. Great Britain, however, caused it to be understood that the condemnation and execution of McLeod would be followed by a declaration of war (f). A writ of *habeas corpus* was applied for on McLeod's behalf; but the Courts of the State of New York refused to release him; with the result that, after being detained in prison for several months, he was ultimately brought to trial and acquitted. In the course of the correspondence that took place Mr. Webster, the United States Secretary of State, admitted that his Government was

(f) Lord Palmerston, then Secretary of State for Foreign Affairs, told Mr. Stevenson, the U. S. Minister in London, that such would be the case.

not inclined to dispute that it was a principle of public law, sanctioned by the usages of all civilised nations, "that an individual forming part of a public force and acting under the authority of his Government is not to be held answerable as a private trespasser or malefactor"; and he therefore agreed that "after the avowal of the transaction as a public one by the British Government, there could be no further responsibility on the part of the agent". The fact of an acquittal rendered it impossible to challenge the proceedings in the State Court. But to prevent the occurrence of any like incident in the future, an Act of Congress was passed in 1842, which, in effect, empowered the Federal Courts to grant a writ of *habeas corpus* in any case where a person, who was a subject or citizen of a foreign State, and domiciled therein, might be held in custody in respect of acts done or omitted under the alleged authority or protection of any commission or orders issued by any foreign State, the validity and effect of which depended on the law of nations (g). In 1857 a claim for damages for wrongful arrest and detention was made before the Claims Commission appointed under the Convention of 1853, but the claim was rejected by the umpire (h).

It is an admitted rule that the public agents of one State cannot be made amenable to the laws of another State, in respect of acts done under the authority of their own State. This would really seem to be only a branch of the wider doctrine, that the acts of the State itself, done in its sovereign capacity, cannot be called in question before the tribunals of another State; for, if the acts of the State itself are exempt from the jurisdiction of foreign tribunals, it follows that the acts of its agents done under its authority and within their delegated powers, or adopted by it, must also be exempt. And this applies to acts done under the authority both of States proper and *de facto* Governments (i). The most obvious application of this principle is seen in the universal recognition of the fact that members of the military forces of a State, although subject to the laws of war, cannot be made amenable to the civil laws of another State, in respect of acts done in the legitimate exercise of belligerent powers. In *McLeod's Case* this was extended by the British Government, and rightly, to acts done, even in time of peace and against the subjects of a nominally

(g) See also Hall, 323, 369, and Taylor, p. 171.

(h) Moore, Arbitrations, iii. 2419.

(i) See *Underhill v. Hernandez*, 26 U. S. App. 573.

friendly Power, under the authority of the State, and for which the State assumed full responsibility. The issue thus became one between the States themselves. In this particular case, Great Britain was able to show that the acts in question had been done under the pressure of self-defence. But even had this not been so, the fact of their having been done under the authority of the State should have sufficed to shield the agent, although reparation might of course have been sought from the State itself (*k*). And the same principle applies to acts, not being belligerent acts, done by other public agents in their official capacity, and within their delegated powers.

So, in *Hatch v. Baez*, 7 Hun. 596, it was held by the Courts of New York State that no action could be maintained in that State against a former President of the Dominican Republic for acts done by him in his official capacity.

So, again, in *Underhill v. Hernandez*, 26 U. S. App. 573, it was held that no action could be maintained in the United States against the defendant, who had been one of the leaders in a revolutionary movement in Venezuela and for some time the civil and military chief of the revolutionary Government there, in respect of divers acts of aggression committed by him against the person of the plaintiff, a United States citizen; such acts having been done as acts of State.

So long as the circumstances are not such as to call for an express adoption of the agent's act, the tacit acquiescence of the State will suffice to make the act effectual as an act of State as against foreigners (*l*). On the other hand, just as a State is at liberty to adopt the act of an agent purporting to have been done on its behalf, so it is also at liberty to disown acts which were not actually done by its orders or within the authority committed to its agents. But if any injury has accrued to another State or its subjects, by reason of any transgression of authority, then such right of disavowal will be subject to an obligation on the part of the State to repair the injury in so far as possible, and to punish the transgressor. Moreover, by pardoning a wrongdoer in a case of this kind, a State will be deemed to accept responsibility as regards the acts complained of (*m*). In the case where a treaty or international agreement has been entered into by an agent in excess of his authority, there is also a right of

(*k*) There would appear to be a tendency in the case of persons accused of war crimes to deny the validity of the defence of superior orders. The question of the trial of war criminals is a new one and presents unsettled features, which cannot be dealt with in this volume on the Law of Peace.

(*l*) *The Rolla*, 6 C. Rob. 364.

(*m*) See award in the case of *Cotesworth and Powell*, Moore, Arb. ii. 2050, at 2085.

disavowal; but this is equally subject to the obligation of restoring any advantage that may have been gained thereunder (n).

PROCEEDINGS BY AND AGAINST FOREIGN STATES

THE UNITED STATES OF AMERICA v. WAGNER

(1867), 36 L. J. Ch. 624; 2 Ch. App. 582.

THIS was a suit brought in the name of the United States of America, asking for an account of certain moneys and goods, which had come into the hands of the defendants as agents of the Southern Confederacy during the rebellion; and that the defendants might be ordered to pay over any moneys found due thereunder. The defendants demurred generally; objecting that the bill ought to be put forward by the President of the United States, or some State officer, upon whom process might be served, and who might answer a cross-bill. It was, however, held by the Court of Appeal in Chancery, overruling the demurrer, that a foreign sovereign Government, adopting the republican form of Government and recognised by the Crown, might sue in the English Courts, in its own name so recognised.

Judgment.] Judgments in this case were delivered by Lord Chelmsford, L.C., Sir G. J. Turner, L.J., and Lord Cairns, L.J. In his judgment, Lord Cairns pointed out that upon the statement contained in the bill, it must be taken that the property claimed in the suit belonged to the United States of America, a foreign sovereign State, adopting the republican form of Government and recognised under that style by Her Majesty. It was, however, contended that this foreign State, being a republic, could not sue in its own name, and must either associate with it as plaintiff, or must proceed in the name of, the president of the republic, or some other officer of State. In pursuance of this contention it was said that when a monarch sues in our Courts he sues as representative of the State of which he is Sovereign, and that he is permitted to sue, not as for his own property, but as head of the executive Government of the State

(n) See Hall, 378; and as to the capitulation of El Arisch, 667. But all treaties, except such as are concluded directly by the treaty-making Power, are now regarded as subject to ratification.

to which the property belonged; and hence that where the property belongs to a republic, the head of the Executive ought to sue for it. This argument, however, was founded on a fallacy. The Sovereign, in a monarchy, might, as between himself and his subjects, be a trustee for the latter. But in the English Courts, as in diplomatic intercourse with the British Government, it was the Sovereign, and not the State, that was recognised. It was also from the Sovereign, and as representing him individually, and not his State, that an ambassador was received. It was in him individually, and not in a representative capacity, that the public property of the State must be assumed to be vested. In a republic, on the other hand, the sovereign power, and with it the public property, was deemed to reside in the State itself, and not in any officer of the State; whilst it was from the State that an ambassador was accredited; and with the State that diplomatic intercourse was conducted. Discovery had nothing to do with the question. The right of a plaintiff to sue did not depend in any way on the effectiveness of the discovery which on a cross-bill could be exacted from him. The true rule was that the person, State, or corporation which had the interest must be plaintiff, and that the Court would then do its best to secure to the defendant such defensive discovery as he might be entitled to. The Court could in fact suspend relief on the original bill, until justice in this respect was done to the defendant.

No question of succession, such as was in issue in *The United States v. McRae*, arose in this case; the only question being as to the style and name in which a foreign State, possessing a republican form of government, ought to sue in the English Courts. This difficulty was disposed of in the judgment in *The United States v. Wagner*, where it was held that, although in the case of monarchies the Sovereign must still be regarded as representing the person, property, and interest of his State, yet in the case of republics both personality, property, and interest must be regarded as inhering in the State itself, as a juristic person, and that such States could therefore sue in their corporate character and under their own name (o). At the same time, there is no rule in English law that all suits in respect of the public

(o) See also *Rep. of Costa Rica v. Erlanger*, L. R. 19 Eq. 33; and *Rep. of Peru v. Weguelin*, L. R. 7 C. P. 352; 20 Eq. 140.

property or interest of a foreign State must be brought in the name either of the Sovereign or of the State itself, as the case may be. Such suits may also be brought in the name of any other agent or body, so long as the latter is duly authorised to represent the interests of the State in relation to the matter in question.

~ In *Yzquierdo v. Clydebank Engineering Company*, [1902] A. C. 524, it was held by the House of Lords that it was quite competent to the Spanish Minister of Marine to sue on a contract that had been made between the "Chief of the Spanish Royal Naval Commission, in the name and in representation of the Spanish Minister of Marine in Madrid", on the one part, and the respondents on the other part—and this although the Minister actually sued had not been Minister at the time of the contract—for the reason that these were the actual parties to the contract. But such suits cannot be brought in the name of a body which is neither a natural nor a juristic person.

In the case of *The Colombian Government v. Rothschild*, 1 Sim. 94, it was laid down that an unknown and undefined body, such as the "Government" of a State, could not sue under such a name, and that if the persons so described could sue at all they must come forward as individuals and show that they were entitled to represent the State.

Suits by Foreign States in English Courts.—As a general rule any foreign State, if duly recognised (*p*), is entitled to sue in the English Courts, or, indeed, in the Courts of any other State, in relation to any matter that is within their competence.~ Such suits may, as has already been pointed out, be brought in the name either of the Sovereign or of the State itself, or in that of any other representative duly authorised. The rules on this subject are commonly represented as being applicable to foreign Sovereigns, but this is due to historical causes previously indicated; and they are in fact equally applicable to foreign States, whether proceeding in the name of the Sovereign or not. Reserving for later consideration the question of suits personal to the Sovereign, and confining ourselves to suits brought by or on behalf of States, it may be said that such proceedings will lie in relation to any matter connected with the public property or interest which gives rise to a claim for relief either as against individuals or corporations. Thus, in the case of *The Emperor of Austria v. Day and Others* (*q*), it appeared that the defendants had manufactured in the United Kingdom a quantity of paper money on behalf of the Hungarian rebels. In a suit by the Emperor of Austria to restrain them from manufacturing any more or disposing of what they had already manufactured, it was held that the prerogative of every State with respect to its coinage was a great public right recognised and protected by the

(*p*) As to the effect of non-recognition, see *The City of Berne v. The Bank of England*, 9 Ves. Jun. 347.

(*q*) 2 Giff. 628.

law of nations; that it was immaterial that the other defendant, Kossuth, for whom the notes were manufactured, contemplated the overthrow of the plaintiff Government, and only intended to use the notes after such overthrow; and that the injunction must therefore be granted (*qq*). But the competence of municipal Courts, in such cases, will not extend to acts of State or disputes between States as international persons; for the reason that acts of sovereignty cannot be made the foundation either of civil rights or civil liabilities (*r*).[✓] Moreover, where the suit does lie, the dignity of a foreign State or Sovereign, even where successful, is not to be disparaged by an award of costs (*s*).[✓]

COMPANIA NAVIERA VASCONGADO v. S.S. "CRISTINA"

107 L. J. P. 1; [1938] A. C. 485.

THE appellants in this case were a Spanish company which had been the owner of the s.s. "Cristina" registered at Bilbao in Spain. On June 28, 1937, the Spanish Republican Government passed a decree requisitioning all ships registered in the port of Bilbao. The "Cristina" was at that time at sea, but on its arrival at Cardiff on July 8 the Spanish Consul at that port went on board, formally requisitioned the ship, and placed a new captain in charge. The shipowners thereupon issued a writ *in rem* in the Admiralty Division of the High Court claiming possession of the ship. Bucknill, J., set aside the writ on the ground that it impleaded a foreign sovereign State,^(r) and the Court of Appeal affirmed this decision.

Judgment.] On appeal to the House of Lords it was unanimously held that the judgments of the lower Courts must be upheld.

There are two propositions of international law, held Lord Atkin, engrafted into our domestic law which are well established and beyond dispute. (1) The Courts of England will not make a foreign Sovereign against his will a party to legal proceedings : (2) They will not by their process, whether the Sovereign is an

(*qq*) The rebel Government in this case, it will be observed, had not been recognised; otherwise the question would have lain outside the jurisdiction of a municipal Court.

(*r*) *S.S. for India v. Kamachee*, 13 Moo. P. C. 22; *Elphinstone v. Bedreechund*, 1 Knapp 316; *Salaman v. The S.S. for India in Council*, [1906] 1 K. B. 613; and *Buron v. Denman*, 2 Ex 167.

(*s*) *Emperor of Austria v. Day*, 30 L. J. Ch. 690; *supra*, p. 22.

actual party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. In the case of the "Cristina" there was a breach of both principles. The ship was, in fact, in possession of the Spanish Government, and the only party claiming an interest adverse to the plaintiffs was the Spanish Government, which, there was no doubt, was in fact impleaded. In Lord Atkin's opinion, though there had been some difference in the practice of nations as to whether the principle extends to property only used for the commercial purposes of the Sovereign or to personal private property, it was well settled it applied to both. Lord Macmillan and Lord Thankerton, as well as Lord Maugham (p. 519), however, expressed their doubts as to the case of public ships used wholly for commercial purposes. The crucial fact, however, said Lord Wright, was simply that *de facto* possession was enjoyed by the Spanish Government, and the position would obviously have been quite different if the respondent were seeking to obtain possession by the process of the Court instead of resisting an attempt by the process of the Court to oust it from actual possession. In the present case the fact of possession had been established by evidence.

The vital fact in this case was that the Republican Government of Spain, the Government of a foreign sovereign State, had obtained before the issue of the writ actual possession of the ship. That being so, there could be no further inquiry by the English Courts as to the validity or otherwise of the means by which that possession had been obtained. The question was not whether the British Court would compel Spanish shipowners adhering to an insurgent party to surrender their ship into the hands of the Spanish Government which had requisitioned it when outside Spanish territorial waters, but whether it would compel the Spanish Government to show that it had lawfully acquired possession. The language used in Lord Atkin's judgment, in particular, supports the view that no distinction is to be drawn by English law in the case of ships under public control, between ships used for public and those used for purely commercial or private purposes by the State government. It is clear, however, that other members of the House regarded themselves as leaving that point open, and the principle decided in *The Porto Alexandre* (1920, p. 30), therefore, still lacks the indorsement of the highest Court. (See further, *The Parlement Belge*, *infra*, p. 285).

In *The El Condado* (No. 2), 1939 (Annual Digest, 1938-40, No. 77),

the Scottish Court of Session rejected the view that they were bound by *The Cristina* in a similar case of a Spanish requisitioned ship which had been detained in a Scottish port. Here, however, action was brought by the Spanish Government against the National Bank of Scotland in respect of their part in procuring an interdict detaining the ship. When the Spanish Government was resisting the process of the Court the only facts in issue were the question of requisition and *de facto* possession. In the case of *The El Condado* (No. 2) the Court had to decide whether a wrong had been committed, and they held that the Spanish decree was not one which would be enforced by the Courts, hence the defenders were under no liability; *The Cristina* in fact decided only the question of immunity, not whether the decree requisitioning the ship outside Spanish jurisdiction was a legal one which foreign Courts would enforce. Other Spanish cases following *The Cristina* were *The Arraiz*, 61 Lloyd's List Law Reports, 1938, p. 39, Annual Digest 1938-40, No. 89; *El Condado* (No. 1), 1937, 59 Lloyd's (1937), p. 119, Annual Digest 1938-40, No. 90; *El Neptuno*, 62 Lloyd's (1938), p. 7, Annual Digest, 1938-40, No. 91.

THE "JUPITER"

93 L. J. P. 156; [1924] P. 236 (No. 1); 94 L. J. P. 59; [1925] P. 69 (No. 2); 96 L. J. P. 122; [1927] P. 122, 250 (No. 3).

IN March, 1924, the master of the s.s. "Jupiter", then laid up in an English port in his charge, without authority handed over the ship to the representatives in England of the U.S.S.R. An action was thereupon commenced for the recovery of the ship by the owners, a company carrying on business in France. This company had formerly been a Russian company, R.O.P.I.T., which had had its head offices at Petrograd, but with a branch office at the port of Odessa, which managed the ship in question which was registered at that port. On the capture of Odessa in 1919 by the Soviet Republics, the management of the company had transferred itself from Russia to France. The French Courts at the time of the action brought had appointed an administrator of all the property of the R.O.P.I.T. company outside Russia.

In 1917, the R.S.F.S. Republic obtained control at Petrograd, but Odessa was never under its control. In 1918, however, a body of persons established a Soviet at Odessa, and remained in control for about two months. During this period the "Jupiter", then at Odessa, was seized by the local Soviet. In March, 1918, Austrian troops occupied Odessa, and the ship

was restored to R.O.P.I.T. Odessa passed from Austrian to French hands, in which it remained until April, 1919, when the Ukrainian Soviet Republic gained control of the place. At that time the "Jupiter" was no longer at Odessa, and at the time of the transfer of the company to France the ship, therefore, was not, and never had been, under the jurisdiction of the R.S.F.S. Republic or any government acknowledging its authority—the Odessa Soviet of 1918 having been a purely local revolutionary body.

The R.S.F.S. Republic had been recognised by the British Government in 1921 as the *de facto* Government, and in 1924 its successor, the U.S.S.R., was recognised as the *de jure* Government of Russia.

The "Jupiter" had been laid up in England since 1922, when the master, on his own authority, had placed the Soviet representatives in possession of the ship.

Under the circumstances, both Hill, J. (in the P. Ad. D. Division of the High Court), and the Court of Appeal held that as the Soviet Government did not accept the jurisdiction of the Court, and a writ *in rem* involved the determination of rights of ownership and the impleading of a foreign Sovereign who had not submitted to the jurisdiction, the claim of the plaintiffs must be dismissed ("Jupiter" No. 1).

In September, 1924, however, the ship was sold on behalf of the U.S.S.R. to an Italian company, subject to an indemnity by the U.S.S.R. against possible claims.

The French company at once issued another writ *in rem*. The Italian company objected that, as the ship had been sold by the U.S.S.R. under an indemnity, to entertain the action would be to implead indirectly a foreign State. This contention was rejected by the Court of Appeal ("Jupiter" No. 2), and the action, therefore, came on for trial ("Jupiter" No. 3) with the French company, together with the French administrator as plaintiffs. The company claimed as owners deprived of possession by the wrongful action of the master of the ship. The administrator claimed also as having been in possession of the ship until the wrongful action of the master.

It was held that the French company was not entitled to sue. If R.O.P.I.T. had been dissolved in March, 1919, by decree of the R.S.F.S.R., as the defendants contended, it had

ceased to exist. If, on the other hand, the company had not been dissolved, its head office was at Leningrad, and no authority from it had been given for the action to be brought. There was no French company registered in the plaintiffs' name—they were merely carrying on business in France. Hence, the name of the French company as plaintiff must be struck out. But both the Court of first instance and the Court of Appeal held that the claim of the French administrator must succeed.

The decree of the French Court made when the ship was at Bordeaux vested possession in the administrator, and in 1924 the plaintiff claiming as administrator must be recognised as in possession of the ship. The master of the ship had no possession in law of the ship, and to hand it over to the U.S.S.R. was a breach of trust.

The claim of the U.S.S.R. rested on certain foreign laws or sovereign acts—on a nationalisation decree of the R.S.F.S.R. of January, 1918, or on a decree of the same Republics of March, 1919, dissolving R.O.P.I.T. and transferring its property to the R.S.F.S.R., or on the seizure by the Soviet at Odessa in 1918.

The declaration on affidavit of the Russian chargé d'affaires in London on behalf of the U.S.S.R. that the "Jupiter" had become the property of the U.S.S.R. by the nationalisation decree of the R.S.F.S.R. of January, 1918, and that the U.S.S.R. had transferred its property to the defendants, was not conclusive. The declaration of a foreign Sovereign as to the ownership of property was not conclusive evidence of the questions of law or fact involved, even if it concerned the passing of property under its law, or by an act of State on its own territory. The effect of foreign law must be proved by evidence of lawyers. There was no question of sovereign immunity here, and the truth of the declaration could be disputed.

The defendants must prove that the ownership had passed to the U.S.S.R. To do this they must prove both the legal effect in Russia of those laws, and that the circumstances were such that they would be recognised in the English Courts.

There was some evidence that even the Soviet Government did not regard its nationalisation decrees as applying to property of Russian citizens outside its territory, and even if the decrees claimed to do so, as the "Jupiter" had never been within the

jurisdiction of the R.S.F.S.R., the English Courts would not recognise the decree. Even had the liquidation of R.O.P.I.T. been complete, the decree of March, 1919, could not be recognised as passing the title to the R.S.F.S.R. in property outside the territorial jurisdiction of Russia.

The goods might become *bona vacantia*, the property of the first occupant, in this case, until the appointment of the administrator, the persons carrying on the French company. Whatever legal effect the seizure at Odessa had at the time, it was nullified by the subsequent restoration of the ship under the Austrian occupation, and, in fact, no continuity of governmental activities between the Soviet of Odessa, set up in January, 1918, and the Ukrainian Soviet Republic, which formed part of the U.S.S.R., had been established. The act of the revolutionary body could not, therefore, be treated as an act of the Government of Russia. The title of the French administrator was, therefore, superior to that of the U.S.S.R., and the Italian company, which was suable in a British Court, had acquired no good title to the ship.

In this case the English Courts recognised the immunity of a foreign sovereign State from process where that foreign State had come into possession of a ship which was at the time in a British port, through the commission of an alleged illegal act on the part of the master. The Courts of the United States, though also according a wide measure of immunity to foreign States appear to have hesitated to accept the principle that a foreign State can confiscate property not within its sovereign domain nor otherwise in its possession or control, and, seizing that property within the sovereign domain of another power, claim exemption from suit in the Courts of the place where the seizure took place (t). It may be reasonable to recognise confiscatory decrees over property within the territory of the confiscating power, and in certain circumstances even outside that territory (u), but it is not altogether easy to determine why respect for the actions of a foreign State should necessarily be allowed to cover with immunity a seizure of property which took place in a foreign country, in which the property still is at the time of action. The British Courts, therefore, have sought to confine the consequences of the doctrine accepted by them to those cases in which the property is still in the possession of the foreign State. Thus, in *The Jupiter* (No. 3), the fact of transfer to a private company rendered enforceable by the original owners a

(t) *The Navemar*, Briggs, p. 251; 303 U. S. 68.

(u) *U. S. v. Belmont*, 85 F. (2d) 542.

right which the possession by a foreign State had made unenforceable but had not extinguished. This seems to mean that English law does not recognise the legality of a foreign confiscatory decree made in the circumstances of *The Jupiter*, but by its respect for the foreign Sovereign it may deprive the parties, whose property has been seized in virtue of that decree, of an effective remedy.

Foreign States cannot generally be sued.—As a general rule foreign States are not liable to be sued either in an English Court or in the Courts of other States; for the reason that it would be a violation of the respect due to a foreign State to allow process in the municipal Courts to issue against it (a). "Considerations of comity and of the highest expediency", it has been said, "require that the conduct of States, whether in transactions with other States, or with individuals, whether their own citizens, or foreign citizens, should not be called in question by the tribunals of another jurisdiction" (b). So, in *The Parlement Belge*, 5 P. D. 197, it was observed that, in view of the independence of every sovereign authority and of international comity, every State declined to exercise jurisdiction through its Courts over the person of any foreign Sovereign, or the public property of any foreign State.

So, in *De Haber v. The Queen of Portugal*, 17 Q. B. 196, where a suit was brought in the Mayor's Court against the Queen of Portugal for the recovery of a sum of money deposited by the plaintiff with a banker at Lisbon, which had been paid over by him to the Portuguese Government under a judicial decree—and it was sought in the course of the suit to attach a sum of money belonging to the Queen in the hands of an agent in London—a rule was obtained from the Court of Queen's Bench prohibiting the Mayor's Court from proceeding in the matter, on the ground that the defendant, being sued as a foreign potentate, was not amenable to the local jurisdiction.

In *Vavasseur v. Krupp*, 9 Ch. D. 351, it was also held that the public property of a foreign State could not become subject to the local jurisdiction even though it might be tainted by the infringement of an English patent.

Moreover, the sovereignty and independence of an alleged Sovereign or sovereign State are matters which the Court will take judicial notice of, or ascertain judicially for itself, and as to which evidence need not be offered by the parties (c). And every State will be deemed responsible under the law of nations for the action of its tribunal in this respect.

Exceptions to this Rule.—To this general rule there are in English law certain exceptions. The first of these exceptions occurs where the

(a) *Per James, L.J.*, in *Strousberg v. Costa Rica*, 44 L. T. 199.

(b) *Underhill v. Hernandez*, 26 U. S. App. 673.

(c) *Taylor v. Barclay*, 2 Sim. 213. In English law this question will be deemed to be authoritatively determined by a certificate or certified statement on the part of a Secretary of State.

foreign State itself institutes proceedings or otherwise voluntarily accepts the jurisdiction. In such a case the foreign State will not only be bound by the ordinary rules of procedure but will lay itself open to any cross-proceedings that may be taken in mitigation of the relief claimed.

So, in *Proleau v. The United States of America*, L. R. 2 Eq. 659, it was held that the United States having commenced proceedings in the English Courts, and thus submitted themselves to the jurisdiction, the defendants in the original action were entitled to proceed for discovery, and that the original action must be stayed until discovery had been made (d).[~]

And the same rule will apply to a case of set-off or cross-claim arising out of the same transaction; such an exercise of jurisdiction being essential in order to enable the Court to do complete justice in the matter (e). But it will not apply to a counter-claim against a plaintiff State or Sovereign, in respect of some separate transaction, as regards which there has been no submission to the jurisdiction (f). Nor will a foreign State be deemed to have submitted to the jurisdiction merely by reason of its having appeared for the purpose of showing title or privilege.

So, in *Vavasour v. Krupp*, L. R. 9 Ch. D. 351, where it was sought to restrain the removal of certain shells on the ground of their having been manufactured in violation of an English patent, the Mikado was permitted to intervene for the purpose of showing that the shells were his property, and were, as such, exempt from the local jurisdiction; nor was such an intervention regarded as a submission to the jurisdiction.

The second exception is more limited in its character, and occurs where a fund or other property in which a foreign State or Sovereign is interested, but in respect of which some equitable claim attaches, is found in the hands of some person over whom the Court of Chancery has undoubted jurisdiction. In such a case it has been held that the Court may proceed to administer the fund, even though a foreign State or Sovereign may be interested in it, if the latter, not being otherwise

(d) See also *The King of Spain v. Hullet*, 1 Cl. & F. 333; *Emperor of Brazil v. Robinson*, 5 Dowl. P. C. 622; and *Republic of Peru v. Weguelin*, L. R. 20 Eq. 140.

(e) *The Newbattle*, 10 P. D. 33.

(f) *South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord*, [1897] 2 Ch. 487; [1896] 1 Ch. 190.

subject to the jurisdiction, should not think fit to appear or to submit to the jurisdiction (*g*).

So, in *Gladstone v. Musurus Bey*, 32 L. J. Ch. 155, where the plaintiffs had deposited certain securities with the Bank of England, in the name of the Turkish Ambassador, as security for the performance of a contract entered into with the Turkish Government, it was held on the Turkish Government threatening to withdraw the securities without having fulfilled its part of the contract, that although the Court of Chancery could not make any order against the foreign State or its ambassador, unless it submitted to the jurisdiction, yet it might restrain the bank from handing over a fund the right to which was in dispute.

But in *Gladstone v. The Ottoman Bank*, 1 H. & M. 505, it was held that after an absolute disposition of property by a foreign Government, even though this was alleged to be in derogation of the contractual rights of a third party, no proceedings would lie; for the reason, apparently, that this would have meant an interference with the acts of a foreign Sovereign done in the exercise of his sovereign power (*h*).

It needs to be observed, however, that these rules, with respect to suits by and against foreign States, only represent the view of the English Courts in this matter, and that elsewhere both opinion and practice on this subject appear to vary (*i*). The right to exercise jurisdiction over immovable property owned by a foreign Sovereign will be considered later in connection with the personal privileges and immunities of foreign Sovereigns.

PRIVILEGES OF SOVEREIGNS OR HEADS OF FOREIGN STATES

MIGHELL v. THE SULTAN OF JOHORE

63 L. J. Q. B. 593; [1894] 1 Q. B. 149.

THIS was an action for breach of promise of marriage brought by the plaintiff against the defendant, who was described in the writ as the "Sultan of the State and Territory of Johore, otherwise known as Albert Baker". It was alleged by the plaintiff

(*g*) *Morgan v. Larivière*, L. R. 7 H. L. at 430; but the precise scope of this exception appears to be somewhat doubtful; see *Vavasseur v. Krupp*, *supra*.

(*h*) On this point and on the subject generally, see Foote, 186, 200.

(*i*) As to the competence generally of national Courts, in matters of civil right not affecting the national sovereignty, where States are concerned, see Westlake, i. 241 *et seq.*; and in our own Courts *Lynch v. The Provisional Government of Paraguay*, L. R. 2 P. & D. 263.

that the defendant had been introduced to her as Albert Baker, and was generally known by that name; that he had represented himself as a private individual and as a subject of the Queen; and that he had made the promise alleged in that character. An order for substituted service having been made, it was now moved to set this aside and to stay all proceedings in the action, on the ground that the Court had no jurisdiction over the defendant. In the course of the proceedings a communication had been made by order of a Judge to the Colonial Office, and in reply a letter purporting to be written by direction of the Secretary of State for the Colonies had been received, informing the Judge that Johore was an independent State and territory in the Malay Peninsula, and that the defendant was the present Sovereign thereof; that the relations between the Sultan and Her Majesty the Queen were relations of alliance, and not of suzerainty and dependence, and were regulated by treaty of 1885; and, finally, that the Sultan generally exercised without question the attributes of a sovereign ruler. In the result an order for a stay of proceedings was made by the Divisional Court, and confirmed by the Court of Appeal. It was held, in effect: (1) that the Courts of this country had no jurisdiction over an independent foreign Sovereign unless he submitted to the jurisdiction, and that such submission cannot take place until the jurisdiction has been invoked; (2) that the fact of a foreign Sovereign entering into a contract in this country under an assumed name, and as a private individual, did not amount to a submission to the jurisdiction; and (3) that a certificate from the Foreign Office, or Colonial Office, as the case may be, was conclusive as to the status of a foreign Sovereign.

Judgment.] In the Court of Appeal, Lord Esher, M.R., in his judgment, pointed out that it was not incumbent on or even desirable for the Court to make an independent investigation into the question of the status of a foreign Sovereign, and that the letter from the Secretary of State for the Colonies, on this subject, must be regarded as conclusive that the defendant was an independent Sovereign. In the matter of personal exemption from the jurisdiction all Sovereigns were equal; and the independent Sovereign of the smallest State stood on the same footing as the monarch of the greatest. The whole question of the immunity of foreign Sovereigns had been carefully considered

in the case of *The Parlement Belge*, 5 P. D. 197. In giving judgment in that case, he had himself pointed out, as the result of a careful consideration of the authorities, and a minute examination of the cases, that in virtue of the independence of every sovereign authority, and of that international comity which induces every State to respect the independence and dignity of every other sovereign State, no jurisdiction could be exercised through the Courts over the person of any Sovereign or ambassador of any other State, or over public property of any State which was destined to public use, or over the property of any ambassador; even though such Sovereign, ambassador or property might be within the territory. And this rule was laid down without any qualifications. Of course, it was open to a foreign Sovereign to submit to the jurisdiction; but the only time at which this could be done was at the time when the Court was about to be or was being asked to exercise jurisdiction, and not at any previous time. For this reason he thought that the Court had no jurisdiction to enter into any inquiry into the matters alleged by the plaintiff.

Apart from the privileges and immunities of foreign States, there are also certain privileges and immunities which attach, both under the English law and in other systems, to the persons of the Sovereigns or titular heads of foreign States; although, in consequence of the personification of the State in its Sovereign, it is not always easy to draw clearly the line of demarcation between the two. Amongst these privileges and immunities the most important is the complete exemption of a foreign Sovereign from the local jurisdiction, whether civil or criminal, not merely in respect of acts done in his public or sovereign capacity, but also in respect of acts done in his private capacity, and within the territorial limits of another jurisdiction. This is clearly recognised in this case which, taken in conjunction with that of *The Parlement Belge*, 5 P. D. 197, may be said to establish the complete immunity of a foreign Sovereign from the local jurisdiction, both in respect of person and property other than local land, and to dissipate some doubts which had previously been entertained on this subject (*k*). The same immunity would also probably be extended to the ruler of a semi-sovereign State (*l*). The only cases in which the English Courts will assume jurisdiction over the person or property of a foreign Sovereign appear to be these: (1) Where he has

(*k*) Foote, 198.

(*l*) *The Charleeh*, 4 A. & E. at p. 77.

initiated the proceedings or has voluntarily submitted to the jurisdiction—in which case he will be subject to the jurisdiction to the same extent as has been previously indicated with respect to foreign States. (2) Where some property or fund, in which he is interested, but which is the subject of some equitable claim, is found in the hands of a private person or corporation over whom the Court has jurisdiction—in which case the property will be subject to the jurisdiction to the same extent as in the case of foreign States. (3) Where he is at the same time a subject of the Crown, and the suit in question relates to acts or transactions done in his private capacity, although even here there will be a presumption in favour of any act done by him having been done as Sovereign (*m*). (4) Where he has acquired immovable property within the territory, so far as relates to actions connected with such property. The last of these exceptions appears to be based on the grounds that the integrity of the national jurisdiction as regards the soil of the State is a principle too vital to admit of qualification; and that the foreign Sovereign by acquiring such property must be deemed to have waived the privilege to which he would otherwise have been entitled (*n*). On the other hand, a foreign Sovereign is entitled to sue in the English Courts not only in respect of his public rights and interest to the extent previously indicated in the case of foreign States, but also in respect of his private rights and property, and for injuries done to him as a private individual; although the practice has hitherto been not to award him costs even though successful. English law also makes special provision for the punishment of offences committed against foreign Sovereigns. Thus, at common law, every one is guilty of a misdemeanour who publishes any libel tending to expose any foreign prince or potentate to hatred or contempt, with intent to disturb the peace and friendship existing between the United Kingdom and the country to which such prince or potentate belongs; although this would not, of course, extend to fair criticism on matters of public interest (*o*). Foreign Sovereigns are also protected by virtue of the Offences against the Person Act, 1861, which makes it a misdemeanour to conspire to murder any person, whether a subject or not, and whether within the British Dominions or not (*p*).

Privileges accorded to Heads of States: (i) *When personally present in foreign countries.*—Every Sovereign, whilst travelling through or tarrying within the territory of another State, with the official knowledge of its Government, customarily receives certain ceremonial honours. He is also entitled by common usage to the privileges of inviolability of person, and extritoriality or complete exemption from

(*m*) *The Duke of Brunswick v. The King of Hanover*, 2 H. L. C. 1.

(*n*) *The Charkieh*, 4 A. & E. at p. 97; *Taylor v. Best*, 14 C. B. 487.

(*o*) *R. v. Vint*, 27 Howell's St. Tr. 627; *R. v. Peltier*, 28 Howell's St. Tr. 529.

(*p*) See *R. v. Most*, 7 Q. B. D. 244.

the civil and criminal jurisdiction of the local Courts. Incidentally he is also exempt from the payment of customs duties and the visitation of customs officers; an immunity which is commonly extended even to articles destined for the use of the Sovereign, in their transit through foreign countries. As with ambassadors, so *a fortiori* with Sovereigns, the exemption from the local jurisdiction would appear to extend to members of his family and suite who may accompany him. Even if he should travel incognito, it would seem that he is entitled to the same privileges if the fact of his identity is known; whilst, if not, then he is at liberty to claim them on declaring his identity (q). He is not entitled, however, to exercise in a foreign country a jurisdiction conceded him by his own law. At the same time, if he should abuse his privilege, it does not appear that there is any remedy available against him, except a request to leave, or, if need be, expulsion. The head of a non-monarchical State, such as the President of a Republic, is, whilst in foreign countries, entitled to the same privileges as a Sovereign; but in the case of a non-monarchical State such privileges would probably attach only so long as its representative was acting ostensibly in his official character. The same privileges also extend to a Regent, who temporarily fills the place of the Sovereign (r).

(ii) *When not personally present.*—Apart, moreover, from his personal presence in a foreign country, the Sovereign or ruler of one State is, by common usage, entitled to certain rights and immunities which are usually conceded by other States. Amongst these some writers include the observance of those rules of ceremony and respect which commonly govern the intercourse of Sovereigns or rulers with each other. Apart from this, a foreign Sovereign is, as a general rule, entitled to proceed in the Courts of other States, either as representing his State, although only, of course, as regards matters within the competence of municipal tribunals; or in relation to his private rights and interests. On the other hand, acts done by him as Sovereign or ruler cannot be made the subject of proceedings before foreign tribunals; and all property belonging to him in his public character is equally exempt, although such exemption would not appear to extend in any case to land, or, according to the prevalent opinion, to movable and other property which he owns in a foreign country as a private person, and not in his capacity as Sovereign (s). Foreign Sovereigns are also, as we have seen, sometimes the subject of special protection accorded them by the municipal law of other States.

(q) *Per Wills, J., in Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149.

(r) On the subject generally, see Phillimore, ii. 135 *et seq.*; Hall, 220, 352; and Oppenheim, i. 587.

(s) See Phillimore, ii. 140; and Taylor, p. 230.

*STATE TERRITORY***MIANGAS (OR PALMAS) ISLAND**

[Award No. 18, Permanent Court of Arbitration at The Hague; Grotius Annuaire (Nijhoff), 1929, p. 190; Hudson Cases, p. 361.]

PALMAS (or Miangas) is a single isolated island lying half-way between Cape San Augustin (Mindanao, Philippine Islands), and the most northerly island of the Nanusa Group (Netherlands East Indies).

In 1906, following a visit to the island of General Wood, Governor of the Province of Moro, in the Philippine Islands, a dispute arose between the United States of America and the Netherlands as to the sovereignty over the island; the United States claiming the island as part of the Philippine group ceded to them by Spain by the Treaty of Paris, 1898, and the Dutch contending that it formed part of the Netherlands East Indies.

In 1925 the two Powers signed a special agreement submitting the dispute to the Permanent Court of Arbitration at the Hague, M. Max Huber being selected by the parties as sole arbitrator.

The United States based its claim on the acquisition by Spain of a title to the sovereignty over the island by discovery, alleged to have remained intact until the Treaty of Paris of 1898 transferred the Spanish rights to the U.S.A.

The Dutch, on the other hand, asserted that the Netherlands East India Company had possessed and exercised rights of sovereignty from 1677 onwards, arising from conventions with the native princes of Sangi, which established the suzerainty of the Netherlands over those princes' territories, which included Palmas (or Miangas).

The arbitrator held that, as the Treaty of Paris could transfer any sovereignty which was in fact vested in Spain in 1898, the essential question was whether Spain had any such sovereignty. The records of the discovery of the Island of Palmas stated only that an island was "seen", which apparently was the island in dispute. No mention was made of any landing, and the name given by the Spaniards, Palm Island, indicated that no contact had ever been made with any native inhabitants, who would doubtless have had their own native name for the island. No signs of taking possession by Spain or administration had been shown until a very recent date.

Even if, as was admitted, the effect of discovery by Spain was to be determined by the rules of international law in force in the first quarter of the sixteenth century, it was by no means certain that even then mere discovery conferred territorial sovereignty and not merely an inchoate title, to be completed eventually by taking possession within a reasonable time. And in the nineteenth century the principle was laid down that occupation to support a claim to territorial sovereignty must be effective. Discovery alone without any subsequent act could not at the present time suffice to prove sovereignty over Palmas. Even if the discovery created an inchoate title, under the view which had prevailed since the nineteenth century such a title must be completed by effective occupation within a reasonable time.

The Island of Palmas, since 1700 at least, had formed part of two of the native States of the Island of Sangi, which came under the suzerainty of the Netherlands from 1677 onwards. Acts of State authority either by the vassal State or the suzerain Power occurred at various times between 1700 and 1898—during this whole period a peaceful display of Netherlands sovereignty took place, which had remained undisputed up to 1906. An inchoate title, even if it existed, could not prevail over a definite title founded on a continuous and peaceful display of sovereignty, and the whole of the Island of Palmas (or Miangas) therefore formed a part of Netherlands territory.

This case is one of the more modern cases in which disputes have arisen as to the title to remote territory over which neither of the two contesting parties had exercised any very effective or continuous control. Title by discovery was unsuccessfully pressed against a display of sovereignty rather than effective occupation or control. Though it was admitted that mere discovery today would be ineffective to confer immediate sovereignty, it was argued that in the sixteenth century the position was otherwise. It would be probably truer to say that the position then was uncertain, and that claims were put forward at that time which the practice of the nineteenth and twentieth centuries has not accepted. *The Clipperton Island Arbitration* between France and Mexico, 1931 (A. J. I. L. 1932, p. 390; Hudson cases, p. 358), affords another useful modern illustration of modern applications of the generally received principles with regard to occupation of territory.

State Property in Municipal and International Law.—From the point of view of municipal law, the State, or, in monarchical States, the Sovereign on its behalf, is commonly invested with two kinds of proprietary right. In the first place, the State may, either in its own right as a juristic person, or through its Sovereign, hold property like any other person, and subject to the conditions of municipal law; either reserving to itself both the disposition and use of such property, as in the case of a public building used by the administration, or reserving the disposition but conceding a right of user to the public, as in the case of a State park or public reserve. In the second place, the State is invested with a right of "eminent domain", which is strictly not so much a right of property as a right of controlling all property found within its limits, even though otherwise vested in individuals or corporations, and disposing of the same in the interest of the community at large. But in international law, and in relation to other States, the State, as representing the organised community, is regarded not only as having a power of disposition over the whole of the national territory, but also as the representative owner of both the national territory and all other property found within its limits. And this conception appears to be both logical and convenient: logical for the reason that international law is strictly concerned only with the relations of States; and convenient for the reason that the State is, on this view, better able to secure the proprietary rights of its subjects as against other States, all questions of individual right and title being merged in that of the State to which the owners belong (t).

The State Territory.—The territory of a State comprises "the whole area, whether of land or water, included within definite boundaries, as ascertained by occupation, prescription, or treaty; together with such inhabited or uninhabited lands as are considered to have become attendant on the ascertained territory through occupation or accretion" (u). It will also include such parts of the sea as are immediately adjacent to or attendant on such territory; these being known as "territorial waters". It will also be presumed to include such adjacent islands as are either situated within a distance of three miles from the coast, or are otherwise to be regarded as natural appendages of the territory (a). The extent of the "territorial waters" of a State, and the right of "innocent passage" to which they are in some cases subject, will be considered hereafter. The progress recently made in the art of aerial navigation and the use of aircraft in war have opened up new questions as to the rights and obligations of a State with respect to the use of its "territorial air". By Art. 1 of the Air Navigation Convention, 1919, the signatories claim "complete and exclusive sovereignty" in the air spaces above their territory

(t) Hall, 52; but see also Westlake, i. 84.

(u) Hall, 125.

(a) *The Anna*, 5 Rob. 373; Westlake, i. 116 *et seq.*

and territorial waters, but this principle is tempered as between the signatories by the grant of freedom of passage to private aircraft which conform to the rules laid down by the convention. The passage of military aircraft is left to be dealt with by special agreement. This may be the best solution of the problems created by the passage of foreign aircraft, provided that innocent passage of all types of aircraft over the main air highways of the world is in fact allowed. A number of other conventions providing for mutual rights of innocent passage have been entered into by various States, *e.g.* The Warsaw Convention for Unification of Rules Concerning International Air Transport, 1929. The principle embodied in the Convention of 1919 has been accepted as regards English law by the Air Navigation Act, 1920. Under the United Nations Interim Agreement on International Civil Aviation which became effective on June 6, 1945, it is likewise recognised that every State has complete and exclusive sovereignty in the air space above its territory, including in that term its territorial waters (b).

The Boundaries of State Territory.—With respect to the boundaries of State territory, these may be ascertained by reference either to artificial lines such as parallels of latitude or meridians of longitude, or by reference to natural features, such as mountains, rivers, lakes, or seas (c). Where the boundary is constituted by a mountain range, the frontier or dividing line will be presumed to follow the water divide. If it consists of a river, then the dividing line will be presumed to follow the middle of the river, unless the river be navigable, in which case it will follow the middle of its deepest channel. But such rights are only presumptive rights, and are liable to be displaced by other evidence of title (d). Within these limits the territorial Power is presumed to have exclusive authority and jurisdiction. The title to such territory may be based either on occupation, prescription, conquest, accretion, or cession.

Interests falling short of Ownership.—In addition to territory of which it is owner, a State may also acquire, either over the territory of other States or over areas not yet appropriated by any civilised Power, certain rights which fall short of ownership. Of these the more important examples are the acquisition of a usufruct by lease; the acquisition of a temporary or provisional right of occupation by conquest or convention; the acquisition of rights in the nature of international servitudes, by convention or prescription; and the acquisition of certain conventional rights, by the establishment of "protectorates" or "spheres of influence"; all of which will be considered hereafter.

(b) Art. 8, A. J. I. L. 1946; Official Documents, p. 69.

(c) Thus by the treaty of 1783 the boundary between the United States and British North America was drawn through the middle of Lakes Ontario, Erie, and Huron.

(d) Hall, 147; Taylor, p. 298 *et seq.*; and, for an interesting case on river boundaries, *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535; *Island of Timor Case*, *Scott's Hague Reports* (1916), p. 354.

Occupation.—Territory not belonging to any civilised State may be acquired by occupation. The importance of occupation as a present method of acquisition has necessarily decreased in proportion to the gradual absorption by civilised States of all available areas (although it might conceivably revive in the event of the discovery of minerals within the Arctic or Antarctic regions); but questions as to its validity or effect still arise between States in relation to past acts of occupation. The conditions under which a valid title may be acquired by occupation would seem in the main to be two: (1) There must be some formal act of appropriation on behalf of the occupying State, either done by its authority or subsequently adopted by it, and either publicly notified or done under the circumstances reasonably sufficient to bring it under the notice of other States (*e*). (2) Such act of appropriation must subsequently be followed by actual settlement and by the establishment of an effective control by the occupant over the area in question. The original act of appropriation will in itself confer an inchoate title; but unless followed within reasonable time by actual settlement and control, the occupation will not be regarded as effective, or as sufficient to exclude the claims of other States (*f*). Nor will the mere fact of discovery, without actual appropriation and settlement, now confer any title to territory (*g*). As regards territory adjacent to the coasts of the continent of Africa, however, the earlier customary law has now been replaced by conventional rules. By the declaration adopted by the parties to the Berlin Conference, 1885 (*h*), it was agreed, in effect: (1) that any signatory Power occupying territory or establishing a protectorate on the Coasts of the African continent should expressly notify this fact to other signatories, with a view to enabling them to make good any claims of their own; and (2) that it should be regarded as incumbent on any signatory Power to ensure the establishment of its authority in any region occupied by it, sufficient to protect existing rights, "and, as the case might be, freedom of trade and transit under the conditions agreed upon" (*i*). Hence, within these limits, there must now be express notification, and seemingly also a sufficient identification of the area claimed, as well as a sufficient establishment not merely of a general control, but of administrative authority on the

(*e*) *The Fama*, 5 Rob. 106.

(*f*) In *The Clipperton Island Arbitration*, 1931, Hudson Cases, p. 358, on the other hand, the King of Italy's decision was that in the case of an uninhabited island which remained uninhabited, the occupation was complete from the time of the act of appropriation, though there seems to have been no settlement or any other assertion of control for nearly forty years.

(*g*) *Miangas (Palmas) Arbitration*, p. 93. As to the earlier history of discovery as a ground of title, see Westlake, i. 99; and as to the effect still attributable to discovery and appropriation, see Hall, 126.

(*h*) Hall, 138.

(*i*) General Act, Berlin Conference, 1885, Arts. 34 and 35. For a discussion as to the effect of these provisions, and especially as to their effect on native rights, see Westlake, i. 105.

part of the occupying State (*k*). Although these rules are strictly applicable only to territory on the coast, there seems a disposition to extend them beyond the limits indicated, and it is not improbable that they may gradually become a part of the general customary law, or be made generally applicable by express agreement (*l*).

Area affected by Occupation.—With respect to the precise extent of territory acquired by an occupation admittedly valid, there has naturally been a disposition by occupants to extend this to the utmost limit; and in aid of such pretensions a number of artificial rules have been put forward both by the text-writers and by States. So, it has been contended that a valid occupation of any extensive portion of the sea-coast will carry a title to all interior country drained by rivers emptying into the sea within such line of coast, as far as the watershed (*m*); or even that a valid occupation of the coast will carry all the hinterland to which the coast gives access (*n*). Again, it has been contended that where there has been an occupation of territory by one State and an occupation of contiguous territory by another, then the boundary should be determined by a line drawn midway between the last posts on either side (*o*). In truth, however, and in so far as the matter can be stated concisely, it would seem that there is only one governing rule, and that is that the area of occupation depends on effective control; whilst the question of the effectiveness and the range of such control would appear to depend largely on the special circumstances of each particular case. Hence, in determining the area affected by occupation, some regard must be had to the local configuration of the country, including its geographical unity (*p*), access and means of communication, the character and extent of the existing population, and the requirements of security; although it does not appear possible to formulate any precise rules on the subject (*q*).

Abandonment of Occupied Territory.—If territory once occupied is abandoned, it will again become open to occupation by other States. At the same time, if there has once been a definite appropriation, the title accruing therefrom will not only be capable of being kept alive by an exercise of authority, less effectual than that required to establish an original claim; but even if there should be a temporary withdrawal, or even if the exercise of all authority should temporarily be relinquished, the territory will be deemed to be open to resumption

(*k*) The obligation to ensure the maintenance of authority is, it will be noticed, strictly only applied to the case of occupation; but in fact it would seem to apply also to protectorates.

(*l*) Hall, 139.

(*m*) But see Hall, 130.

(*n*) Westlake, i. 114.

(*o*) Taylor, 131; Hall, 130.

(*p*) A single act of occupation, for instance, would suffice for an island of moderate dimensions.

(*q*) On the subject generally, Westlake, i. 111; Hall, 129; Oppenheim, i. 441.

or recovery within a reasonable time, having regard to the circumstances of the withdrawal (r).

Prescription.—Another mode of acquiring State territory is prescription. This is a principle both of international and municipal law, in virtue of which a title is presumed to be acquired by long possession and user. It applies, moreover, not only to the acquisition of territory, but also to other rights; and rests on the necessity of promoting stability in international affairs, and of checking unnecessary disturbance, and excluding stale claims. Its recognition as a legal principle does not, of course, exclude political changes or the operation of other titles, including title by conquest or secession. It merely means that in international as in municipal law rights may be acquired or affirmed by long user and acquiescence, although capable, like other rights, of being abrogated or displaced (s). In this character prescription appears to have the sanction both of international usage and of judicial authority.

Thus, in *The Direct United States Cable Co. v. The Anglo-American Telegraph Co.*, 2 App. Cas. 394, it was stated by the Privy Council that inasmuch as Great Britain had in fact long exercised dominion over Conception Bay in Newfoundland, and inasmuch as this had been acquiesced in by other nations, so as to show an exclusive occupation by that Power, that bay must be deemed to have become by prescription a part of the territory of Great Britain.

Again, in the treaty of 1897, by which the boundary dispute between Great Britain and Venezuela was referred to arbitration, it was laid down as a rule for the guidance of the arbitrators (1) that an adverse holding for fifty years should confer a good title; and (2) that if the territory claimed by one Power should be found to be occupied by citizens of another, then such effect should be attributed to this occupation as reason and justice, or the rules of international law, or the circumstances of the case, might, in the opinion of the arbitrators, require (t).

At the same time, the term required in order to establish a title by prescription appears to be altogether undefined. Some writers suggest that possession or user must have existed from time immemorial; others only that it should have existed for a reasonable time, others that a period of fifty years should be fixed by international arrangement. So far, it is not possible to state the rule more definitely than that possession or user must have continued for a reasonable time, having regard to the longer life of nations, the nature of the right claimed, and the circumstances attending it in

(r) Hall, 140, where the cases of *Santa Lucia* and *Delagoa Bay* are discussed. See also *The Case of the Legal Status of Eastern Greenland* (1931), *infra*, p. 120.

(s) For an interesting note on this aspect of the subject, Hall, 144 n.

(t) For a short account of this arbitration, Hall, 136.

each particular case. And the same considerations would probably attach to the application of the principle of desuetude in international affairs (*u*).

Other Modes of Acquisition.—Other modes of acquiring territory comprise cession, conquest, and accretion. A cession of territory may take place by voluntary arrangement, and, in this case, either by way of sale, gift, or exchange. The consequences of cession have already been described. The subject of title by conquest will be considered in Volume II. Accretion is a title borrowed from the Roman law; and applies where new land is formed by the action of water either impinging on existing territory or so adjacent thereto as to constitute a natural appendage (*a*).

Leases and Pledges of Territory.—The lease or cession in usufruct of State territory for a term of years is apparently a modern device, and has been applied mainly, although not exclusively, to the territory of China. As to the effect of such international leases, it would seem strictly that, whilst conferring rights of user and enjoyment on the lessee, yet the territory remains subject to the sovereignty of the lessor, and subject also to any prior obligations specifically attaching thereto. The reservation of sovereignty, moreover, might also be said to imply the obligation on the part of the lessee not to use the territory to the prejudice of the lessor. Apart from the leasing of State territory, there are also cases to be found where one State has hypothecated a part of its territory to another State as security for the payment of a debt; but the only case in which such a lien over State territory would now be likely to arise would be the case where one belligerent continued in occupation of territory belonging to the other belligerent after the conclusion of peace, as security for the payment of an indemnity, of which the occupation of the left bank of the Rhine and bridge-heads by the Allied and Associated Powers is an example (*b*).

Servitudes and Restrictive Covenants.—Apart from the grant of ownership or possession, one State may grant to another certain rights

(*u*) On the subject generally, Hall, 144; Westlake, i. 92; Oppenheim, i. 454.

Modern examples of the recognition of prescription are found in the *Island of Palmas Arbitration* (*supra*, p. 109) A.D. 1927-8, Cases 68 and 75; *The Chamizal Arbitration*, 1911, A. J. 1911, pp. 785-812; and *Grisbardarna Arbitration*, 1909, Scott Hague Court Reports (1916), pp. 121-133. The question has also arisen in several controversies between States of the United States of America. Thus in a dispute concerning a boundary affected by avulsion, of the fact that the State of Arkansas had made no claim 1826-1940, gave rise to a prescriptive title: *Arkansas v. Tennessee*, 310 U. S. 563; U.S. Supreme Court, 1940, Annual Digest 1938-40, No. 43. See also *The Case of the Legal Status of Eastern Greenland*, [1931] P. C. I. 5, Series A/B, No. 53, *infra*, p. 120.

(*a*) See *The Anna*, 5 Roh. 373; and as to the effect of accretion or avulsion as regards river boundaries, see *Cooley v. Golden*, 52 Missouri App. 52; *Arkansas v. Mississippi* (Annual Digest, 1919-22, No. 60), and *Arkansas v. Tennessee* (*supra*).

(*b*) In 1803 Sweden pledged the town of Wismar to Mecklenburg-Schwerin. On leases generally see Oppenheim, i. 353-5.

over or in relation to its territory, which confer on the grantee a strictly defined right of user, or impose on the grantor some definite restraint on user in favour of the grantee. Such rights, when they are in their nature real as distinct from personal, and of such a kind as would on the principles previously indicated be binding on the successor in cases of cession or annexation, are commonly styled international servitudes (c). Whether the term "servitude" be appropriate or not, rights of this kind are both admissible on principle and existent in fact. So, one State may concede to another a right of transit, for various purposes, through its territory, although a concession of a right of passage for troops in time of war would probably not now be regarded as permissible, or as consistent with neutrality in the event of war (d). So again, one State may concede to another a right of fishery, either exclusive or concurrent, within its territorial waters. Thus, on the cession of Newfoundland by France to Great Britain in 1713, certain rights of fishery, and other rights incidental thereto were conceded to France, along certain parts of the coast, and these rights were exercised until surrendered under the stipulations of the Anglo-French agreement of 1904. Again, by treaties of 1783 and 1818, certain rights of fishery in the territorial waters adjoining the coasts of British North America were conceded to, or, as the United States contended, reserved by, the United States. Somewhat analogous are the restrictive covenants occasionally entered into, whereby one State agrees, in favour of some other State, either not to dispose of or not to fortify certain parts of its territory.

Protectorates.—What has been aptly called a "colonial protectorate" (e) is a form of control, falling short of full sovereignty, assumed by a civilised State over the territory of an uncivilised or semi-civilised community. The territory comprised in such a "protectorate" differs from territory acquired by occupation or annexation, because it does not strictly form an integral part of the territory of the protecting Power; whilst the native inhabitants, although entitled to protection, do not strictly become its subjects. On the other hand, such a protectorate differs from the "Protected States" already described, because it is not exercised over a State or organised community, but only over territory occupied by barbarous or uncivilised tribes, and also because it is generally only a prelude to ultimate absorption. At the same time, it is not always easy to draw the line between the two. In the event of the protecting Power being involved in war, the protected territory

(c) Such rights must be distinguished from those fundamental restrictions on the user of State territory which accrue not from treaty or convention, but under the law of nations itself; such as restrictions which forbid the use of State territory in aid of one belligerent as against another in the course of a war in which the territorial Power professes to be neutral.

(d) By Convention No. V of The Hague Convention of 1907, Art. 14 however, a neutral State may allow the passage of sick and wounded over its territory so long as no combatants or war material are carried.

(e) See Westlake, i. 119.

would probably be regarded as hostile by the other belligerent, whilst in the event of a war between two other Powers it would probably be regarded as entailing the same obligations as those which usually attach to neutral territory proper. Such a protectorate is commonly established by compact with the chiefs of the tribes inhabiting the region in question but it may be assumed without any such agreement, although in either case its assumption ought to be brought to the notice of other Powers. Its effect is to debar other States from either acquiring settlements, or entering into political relations with the native tribes, within the protected territory. Although such protectorates are not within the express provisions of Art. 35 of the General Act of the Berlin Conference, 1885, yet their establishment would seem to entail the responsibility of providing a reasonable measure of domestic control, and a reasonable amount of security (*f*) as regards the persons and property of subjects of other States lawfully entering such territory. Such control is in some cases exercised directly by the protecting Power and in other cases through the agency of a chartered company. The system of internal administration adopted in colonial protectorates differs greatly. French protectorates appear to be scarcely distinguishable from ordinary colonies, and differ little in their system of administration jurisdiction being assumed over foreigners and nationals alike (*g*). Even in British protectorates the internal administration varies greatly. In some, legislative and judicial powers have been assumed by Order in Council in varying degrees, such powers being exercised either directly by the Crown or sometimes through the medium of a chartered company (*h*), in some cases this jurisdiction is expressly extended to British subjects, natives, and foreigners alike (*i*), whilst in other cases its application to foreigners appears to have been left undetermined (*k*). In others, the internal administration is left almost entirely in the hands of the native or local authority, the protecting Power being represented only by a Commissioner or Consul General, whilst jurisdiction, in cases where British subjects are concerned, is exercised by consular courts (*l*).

"Spheres of Influence" (*m*)—A sphere of influence, so far as it can be said to possess a definite meaning, indicates a region, generally inhabited by races of inferior civilisation, over which a State seeks,

(*f*) Reasonable, that is having regard to the situation of the country and the condition of the inhabitants.

(*g*) Hall, 151 *n*, and Tunis Nationality Decrees, *infra*, p. 191.

(*h*) As in East Africa, and in Southern and North Eastern Rhodesia respectively.

(*i*) As in British East Africa and North Western Rhodesia.

(*k*) As in British Central Africa.

(*l*) As in the case of Zanzibar. On the subject generally, Hall, *Foreign Jurisdiction*, 211, Westlake, 119, Taylor, 270.

(*m*) This is the nomenclature usually adopted, although it would really seem that what are here called 'spheres of influence' might, more appropriately, be styled 'spheres of interest', and that what are hereafter called 'spheres of interest' might, more appropriately, be styled 'spheres of influence'.

by compact with some other State or States that might otherwise compete with it, to secure to itself an exclusive right of making future acquisitions of territory (*n*), and, generally, also, the direction and control of the native inhabitants. Such compacts are intended to guard against future conflicts that might otherwise arise; and are usually the result of a bargain under which some special areas of interest are allotted as between the respective parties to the arrangement. Such spheres of influence were established: (1) As between Great Britain and France, with respect to certain parts of Africa, by declaration and agreements made in 1890, 1891, and 1898 (*o*). (2) As between Great Britain and Portugal, with respect to certain parts of the African continent, by agreements made in 1890, 1891, 1893, and 1896 (*p*). (3) As between Great Britain and Italy, with respect to certain parts of East Africa, by protocols of 1891 and 1894 (*q*). (4) As between Great Britain and the Congo Free State, with respect to certain parts of East and Central Africa, by an agreement of 1894 (*r*). But such arrangements confer no territorial rights and impose no responsibility on the State in whose favour they are created, in relation to non-contracting Powers; and although considerations of comity or fear may induce the latter to respect such arrangements, yet this is a matter of policy, and not of law. Nor can such compacts, even if acquiesced in by other States, give rise to any prescriptive right (*s*).

"Spheres of Interest."—Somewhat different as regards their objects are those agreements which allocate certain areas already occupied by States more or less civilised as spheres of influence or interest between Powers, having already interests adjacent thereto; although the line between these and the former is sometimes difficult to draw. Such arrangements, again, are merely political, and involve no legal consequences other than those arising out of the compact.

The Occupation and Administration by One State of Territory belonging to Another.—Occasionally, too, we find territory which is subject to the joint sovereignty or *condominium* of two or more Powers. So, under a convention of 1899 the Sudan has been recognised as being subject to the *condominium* of Great Britain and Egypt. There are also cases in which territory, while remaining nominally subject to the sovereignty and dominion of one State, is nevertheless occupied and administered by another. Thus, in 1878 the island of Cyprus was assigned by Turkey to Great Britain, to be occupied and administered

(*n*) Whether by annexation or by the establishment of protectorates; Hall, *Foreign Jurisdiction*, 228.

(*o*) These relate to North Africa, the Upper Niger, and the region east of the Niger; see *Brit. and For. State Papers*, vol. 82, p. 89; vol. 83, p. 43; vol. 91, pp. 38 and 55.

(*p*) These relate to the Zambesi and Eastern and Central Africa: *Brit. and For. State Papers*, vol. 82, p. 337; vol. 83, p. 27; vol. 85, p. 65; vol. 88, p. 5.

(*q*) *Brit. and For. State Papers*, vol. 83, p. 19; vol. 86, p. 55.

(*r*) *Ibid.*, vol. 86, p. 19.

(*s*) On the subject generally, Hall, 153; Westlake, i. 139; Taylor, 271.

by the latter Power, subject to certain reservations in favour of the Sultan, to the payment of £92,800 out of the net revenue (*t*), and to the formal sovereignty of Turkey. Cyprus was, however, annexed by Britain in 1914, the annexation being recognised by Turkey in 1923. Again, after 1878 the Turkish provinces of Bosnia and Herzegovina were for some time occupied and administered by Austria-Hungary, subject to the sovereignty of Turkey (*u*); but in 1908 this arrangement was repudiated, and the provinces formally annexed by the former Power. By an agreement concluded in February, 1909, Turkey agreed to renounce her rights over these provinces in consideration of the payment of an indemnity, the recovery and control over Novi Bazar, and certain other concessions on the part of Austria-Hungary. The annexation was also recognised by Great Britain, France, Germany, Italy, and Russia. By a tripartite arrangement subsequently made between Turkey, Bulgaria, and Russia, it was agreed that Bulgaria should pay to Russia a sum of £3,280,000 in satisfaction of various Turkish claims (including her liability on account of the Turkish debt), and that Russia should thereupon cancel a portion (£T.5.250,000) of the debt owing to her by Turkey, in respect of the war indemnity of 1878. By the Peace Treaty of St. Germain-en-Laye, of September 10, 1919, Austria renounced all rights and title over these territories in favour of the Serb-Croat-Slovene State (*a*). The international effect of these anomalous forms of control has already been indicated. By international arrangement, also, the maintenance of internal peace and order in one country is sometimes committed to the Government of another country, but without any right of occupation. Thus, as the result of the Algeciras Conference, 1906, at which twelve States were represented (including both Great Britain and the United States, although the latter Power did not vote), it was agreed that for five years France should officer the police of four, and Spain of two, of the ports of Morocco; that Spain and France together should officer the police of Tangier and Casablanca, subject to an inspector to be appointed by a third Power; but that the police officers so appointed should be responsible both to the Sultan and to the Diplomatic Corps. Other articles relate to the control of the State Bank, the prohibition of contraband, and the opening up of the ports to other States.

LEGAL STATUS OF EASTERN GREENLAND

[1931] P. C. I. J. Series A/B, No. 53.

In 1931 the Danish Government, invoking the optional clause of article 36, paragraph 2, of the Statute of the Permanent Court

(*t*) Holland, *European Concert*, 354.

(*u*) Both these cases are fully discussed in Westlake, *l.* 135.

(*a*) Treaty Ser. No. 11 (1919) [Cmd. 400].

of International Justice, brought a suit against the Norwegian Government on the ground that Norway had, on July 10, 1931, published a proclamation asserting that it had occupied certain territory in Eastern Greenland which was subject to the sovereignty of Denmark. Denmark asked the Permanent Court to declare that such declaration of occupation was illegal and invalid.

Greenland has a total area of about 2,200,000 square kilometres. It is an arctic country, five-sixths of its area being covered with inland ice—only a narrow strip along the coast being free of permanent ice.

The country was discovered by Norwegians about A.D. 900, and certain settlements which had ceased to exist before 1500 were made on the west coast. From 1500 to the eighteenth century there were no settlements in Greenland, but the waters surrounding it, particularly the east coast, were constantly visited by whalers.

At the beginning of the eighteenth century, the kingdoms of Norway and Denmark, then being still under the same rulers, Pastor Hans Egede, a missionary of Bergen, in Norway, founded a Greenland company and founded a new colony on the west coast in 1721. This company was granted a concession for twenty-five years of the whole country of Greenland in 1723. On the dissolution of the company the Danish-Norwegian State assumed control of the administration of the settlement, and, after the granting and expiration of certain other concessions in 1774, was controlling the Greenland trade. At this period a number of new settlements were made on the west coast, but the east coast proved inaccessible.

From 1380 to 1814—the period during which Norway and Denmark were united—Greenland seems to have been regarded as a Norwegian possession. At the peace treaty of Kiel, 1814, however, Denmark was compelled to cede Norway to Sweden, but Greenland, the Faroe Islands and Iceland were expressly excepted from this cession. A convention signed at Stockholm in 1819 supplemented this arrangement.

The coasts of Greenland were completely explored in the course of the nineteenth and early twentieth century. Danish expeditions had explored the entire east coast before 1927. The first landing in the disputed area was made by a Scottish whaler,

"Scoresby", in 1822. In 1863 the Danish Government granted a concession to an Englishman, Taylor, for the establishment of trading stations on the east coast, but this venture proved a failure.

In 1894 the first Danish settlement on the east coast was established. From 1919 to 1924 the Danish Eastern Greenland Co. carried on hunting operations along part of the coast and built hunting cabins on shore. In 1925 a trading station was set up at Scoresby Sound. Another company operated from 1929 onwards.

From 1889 onwards there were also a number of Norwegian expeditions to Greenland. In 1922 a provisional wireless station was set up at Mackenzie Bay, despite Danish protests, and intermittently maintained there. From 1929 a number of Norwegian hunting cabins were built on part of the shore.

At the end of the First World War, Denmark, in 1919, sought to obtain a settlement of her claims as regards Greenland by a formal acknowledgment by Norway of Danish rights to the whole of Greenland in return for support to Norway's claims on Spitzbergen. M. Ihlen, the Norwegian Foreign Minister, gave certain assurances, the exact meaning of which was afterwards disputed, that Norway would make no difficulties as to Greenland.

In 1920 to 1921 Denmark asked for and received satisfactory assurances as to Greenland from Britain, France, Italy, Japan and Sweden, but Norway, who was also approached, raised certain difficulties as to conditions for fishing. It clearly emerged that, whereas Denmark was claiming sovereignty over Greenland, Norway regarded a large part of that country as *res nullius*. A convention was signed between the two countries in 1924 for provisional regulation of the position, both parties maintaining their claims.

Danish legislation as to fishing in 1925 led to a Norwegian protest, and up to 1930 Norway had maintained her position. In that year the Norwegian claims became more definite. Police powers over Norwegians in the Norwegian trading stations in Greenland were provided for by Norwegian legislation, against the objections of Denmark.

Denmark thereupon embarked on a three-year plan for scientific research and exploration in the central part of Eastern

Greenland, which was considered by Norway to foreshadow a Danish attempt at colonisation in the area of the Norwegian trading stations. Discussions were still proceeding when certain Norwegian hunters raised the Norwegian flag in Mackenzie Bay, in Eastern Greenland, and proclaimed the occupation of the territory between Carlsberg Fjord and Bessel Fjord in the name of the King of Norway. Norway decided to bring matters to a head by confirming by royal proclamation the occupation announced by the private traders.

The Danish Government brought the matter before the Permanent Court of International Justice.

Denmark claimed (1) that her sovereignty over Greenland had existed for a long time, had been continuously and peacefully exercised and, until the present dispute, had been uncontested by any other Power; (2) that Norway had by treaty or otherwise recognised Danish sovereignty and could not afterwards dispute it.

Norway claimed that the territory occupied lay outside the limits of the Danish colonies in Greenland and was *terra nullius*.

Judgment.] The Court, considering the fact that the Danish claim was based on peaceful and continuous display of State authority, thought that the extent to which the sovereignty was also claimed by another Power was material. Up to 1931 there had been no claim by any Power other than Denmark to sovereignty, and, indeed, up to 1921 no Power disputed the Danish claim to sovereignty. The records of decisions of cases on territorial sovereignty showed that in many cases the tribunal had been satisfied with very little in the way of actual exercise of sovereign rights, provided that the other side made out no superior claim. Norway claimed that after the disappearance of the two early Nordic settlements Norwegian sovereignty was lost, and Greenland became a *terra nullius* through conquest by the Eskimos and voluntary abandonment. There was nothing to show any definite renunciation on the part of the Kings of Denmark and Norway. The pretensions of Norway and Denmark were maintained, and in the early seventeenth century there were expeditions. But the claims were mere pretensions—no authority was exercised there. But no other Power was putting forward any competing claim, and in

the absence of any competing claim the King's pretensions to be Sovereign of Greenland subsisted.

After the founding of Hans Egede's colonies in 1721, there was in part of Greenland a manifestation and exercise of sovereign rights—the question being how far the rights extended. The eighteenth century legislation of Denmark embodied a claim to legislate for the whole of Greenland. Bearing in mind the absence of any claim to sovereignty by another Power, and the Arctic and inaccessible character of the uncolonised parts of the country, the King of Denmark and Norway displayed during the period from the founding of the colonies by Hans Egede, in 1721, up to 1814, his authority to an extent sufficient to give his country a valid claim to sovereignty, and his rights over Greenland were not limited to the colonised area.

The rights over Greenland up to 1814 were possessed by the King of Norway, and in the Treaty of Kiel what had been a Norwegian possession remained with the King of Denmark and became a Danish possession.

Treaties in the nineteenth century constituted some evidence of recognition by other Powers of her sovereignty over Greenland, and might also be regarded as demonstrating sufficiently Denmark's will and intention to exercise sovereignty over Greenland.

On the question whether from 1814 to 1915 Denmark exercised authority in the uncolonised area sufficiently to give her a valid claim to sovereignty, these treaties, coupled with the grant of concessions in 1863 to Taylor of exclusive rights on the east coast, and concessions for the erection of telegraph lines, and legislation fixing the limits of territorial waters in 1906, constituted manifestations of the exercise of sovereign authority.

In view of these facts, and the absence of all claim to sovereignty over Greenland by any other Power, Denmark must be regarded as having displayed during the period 1814 to 1915 her authority over the uncolonised part of the country to a degree sufficient to confer a valid title to the sovereignty.

As to the applications made by the Danish Government between 1915 to 1921, the Court held that the Danish Government was merely seeking recognition by foreign Powers, that they accepted its claim to an existing sovereignty over the whole of Greenland.

The Court examined these negotiations, and, in particular, those with M. Ihlen, and concluded that their object was to ensure that the Powers approached would not themselves attempt to take possession of any non-colonised part of Greenland. The method of achieving this object was to get the Powers to recognise an existing state of fact.

In the period following 1921 there was a considerable increase in the activity of the Danish Government on the east coast of Greenland. The Danish legislation which was enacted was an exercise of governmental functions in connection with the territory in dispute. There were also Danish hunting and scientific expeditions. The convention with Norway of 1924 did not affect the rights of either party to maintain its point of view. Even if the period 1921 to 1931 was taken by itself, the Court concluded that during that time Denmark regarded herself as possessing sovereignty over all Greenland, and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty. Denmark, therefore, on July 10, 1931, possessed a valid title to the sovereignty over all Greenland, and the occupation by Norway on that date was therefore illegal.

The Court also considered that in the course of negotiations between the Powers, Norway had in three cases given undertakings recognising Danish sovereignty over all Greenland, and by twelve votes to two (Anzilotti, J., and Vogt, J., *ad hoc*, dissenting) gave judgment in favour of the Danish claim.

This case was the only considerable dispute raising general questions of title to territory alleged to be unoccupied decided by the Permanent Court of International Justice. If the decision had rested in any real sense in a claim by Denmark to an effective occupation of the east coast of Greenland, there would have been much to be said for the Norwegian point of view. The claim must be regarded as based on prescriptive rights arising from settlement on a small portion of a very large uninhabitable country, coupled with continuous claims to, and manifestations of, sovereignty through various legislative and governmental acts, acquiesced in during a long period of years by the other Powers of the world. Judged by the standards of effective occupation the evidence as to the early Nordic settlements would have been very largely irrelevant. These were certainly extinct for more than two hundred years, possibly a great deal longer, before any further attempt at colonisation took place. In any event, it can hardly be seriously maintained that Norse adventurers settling at a few places in Greenland

in A.D. 900 had any effective control over any very considerable portion of Greenland. As a foundation for a claim based on prescriptive rights, however, the Nordic settlements have an obvious place in the Danish case, which sets up that there was an undisputed claim to sovereignty going back for many centuries, reinforced by the settlement of a portion of the west coast of Greenland in the eighteenth century. The argument to which the judgment appears to attach some weight, that the territory was arctic and inaccessible, and, therefore, that numerous settlements were not to be expected, so that such settlements as there were might be treated as giving a wider control than in more hospitable countries might be considered reasonable, is worthy of consideration, but it might equally well have been argued that the inaccessible nature of the country made effective governmental control more difficult and for that reason the area to be treated as occupied by reason of the existence of a settlement on the coast should be correspondingly less. The weight attached to claims and manifestations of sovereignty without evidence of effective control over the part of Greenland in dispute, coupled with acquiescence by other Powers, indicates the decision of the Court as based on the ground of prescriptive rights rather than of effective occupation.

THE NAVIGABLE RIVERS OF A STATE; INTER-STATE RIVERS

CONTROVERSY BETWEEN GREAT BRITAIN AND THE UNITED STATES OF AMERICA WITH RESPECT TO THE NAVIGATION OF THE RIVER ST. LAWRENCE

[1826; Phillimore, i. 242 *et seq.*; Wharton, Digest, i. § 30; Moore, Digest, i. § 131.]

THE river St. Lawrence has a course of some 750 miles, extending from Lake Ontario to the Atlantic Ocean. The northern shores, both of the river and of the lake from which it issues, are wholly within the territory of the British Empire. The southern shores of the lake, together with the southern shores of the river up to a certain point at which the northern boundary of the United States impinges on the river (lat. 45° N.) are within the territory of the latter country; whilst the southern shores of the remainder of the river, together with the mouth, are within the territory of the British Empire. In 1826 the United States of America put forward a claim to the free navigation of the river throughout its whole course, including

those portions which are wholly within the territory of the British Empire. On behalf of this claim it was urged, in effect, that there was a natural right on the part of the inhabitants of the upper banks of a navigable river that they should have free communication with the sea. The arguments on this point were much the same as those which had been previously urged in the negotiations with Spain respecting the navigation of the Mississippi. Here it had been said that, even though the lower portions of that river were within the exclusive control of another State, yet there was a right on the part of upper riparian dwellers to "innocent passage" through the lower portions of the river for the purpose of reaching the sea. It was also pointed out that Great Britain had herself put forward a similar claim with respect to the navigation of the Mississippi when she had occupied the position of an upper riparian State. Stress was also laid on the importance of the claim as affording to the great and growing population inhabiting the banks on the south side of the river and lakes their only natural outlet to the ocean. It was finally pointed out that the claim was greatly strengthened by the fact that this right of navigation had, prior to the separation from the Mother Country, been the property of all British subjects inhabiting the continent, and had been wrested from France by the common exertions of the Mother Country and her colonies in the war of 1756. The claim, moreover, whilst necessary to the United States, was not one which was likely to prove injurious to Great Britain.

To this contention Great Britain replied, in effect, that such a claim was not warranted either by the principles or practice of the law of nations. The liberty of passage by one nation through the dominions of another was a qualified and occasional exception to the paramount rights of property. It was, at the most, only an "imperfect right". The fact that such a right had been conceded by treaty, as regards certain of the great European rivers, in itself went to show that such a right was not a natural right, but one that required to be established by convention. It was further pointed out that such a right of passage, once conceded, must hold good, not only for the purposes of trade in time of peace but also for hostile purposes in time of war. Finally, it was urged that the United States could not consistently with principle put forward such a claim without

being prepared to grant reciprocal rights, in favour of British subjects, to the navigation of the Mississippi and the Hudson, to which access might be had from Canada by land carriage or by canal.

To this argument the United States replied that the St. Lawrence river ought really to be regarded as a "strait" connecting the ocean with the great inland lakes, the shores of which were inhabited alike by subjects of the United States and Great Britain, and that such a natural channel ought to be equally available for passage by both. There was, moreover, a clear distinction between passage over land and passage over water, for the reason that water passage involved no detriment or inconvenience to the country to which the shores belonged, whilst land passage might be fraught with both. The United States would not shrink from applying the same principle to American rivers, in the event of any connection being effected between them and Upper Canada, similar to that which existed between the United States and the St. Lawrence. At the same time the navigation of a river flowing wholly through the territory of one State could not be regarded as governed by the same principles as a river which flowed through the territory of two or more different States. Finally, it was contended that the fact that the free navigation of rivers had been made a matter of convention did not disprove that such a right of navigation was in itself a natural right, which had been restored to its proper position by treaty.

Settlement.] The controversy was provisionally settled by the reciprocity treaty of 1854, which, in effect, conceded to the citizens and inhabitants of the United States a right of navigating the river St. Lawrence and the canals of Canada as a means of communication between the Great Lakes and the Atlantic Ocean, subject to the same tolls and assessments as those exacted from British subjects. A similar right of navigation was conferred on British subjects with respect to Lake Michigan, together with the use of the State canals. But this arrangement was made terminable on notice, and was in fact terminated by the United States, in 1866, under a resolution of Congress adopted in 1865. The matter was, however, finally settled by the Treaty of Washington, 1871. This treaty, which is still in force, provides that the navigation of the river St. Lawrence, ascending and

descending from the 45th parallel of North latitude, where it ceases to form the boundary between the two countries, from, to, and into the sea, shall for ever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The treaty concedes similar rights to British subjects with respect to the St. Clair Flats Canal, and also provides that the navigation of the rivers Yukon, Porcupine, and Stikine shall be free to the subjects and citizens of both Powers. Each of the contracting Powers also agrees to use its influence to secure an extension of this principle. At the same time no general right of free navigation is conceded.

The respective contentions of the parties to this controversy serve to illustrate the divergent opinions which prevailed at the time, and which to some extent still prevail, as to whether there exists in international law, and apart from treaty, a right of innocent passage on the part of co-riparians over the waters of a navigable river which flows through two or more States. Omitting minor arguments, the main contention of the United States was that there is in such cases a natural right of passage; that such a right gains in strength when the waters in question afford the only means of access to the ocean for a large and growing population; and that, although such right may be styled an "imperfect right", it is nevertheless one a denial of which will be a title to redress. This contention was scarcely in keeping with the state of international usage at the time; although undoubtedly usage has since advanced in the direction of the American contention. Great Britain, on the other hand, appealed to the stricter principle that the rivers of a State, so far as they are wholly within its borders, constitute a part of the national territory; that a right of passage over such territory can only be claimed by agreement; and that the very fact of such a right being frequently conceded by treaty shows that there is no such natural right. The latter argument is cogent, but not under all circumstances conclusive. On the one hand, although it is no doubt true that a right may be regulated by treaty without having its origin in treaty, yet the fact that such a right wherever it exists is found to rest on treaty certainly affords a strong presumption that there is either no such right apart from treaty, or that it is of too vague and shadowy a nature to be made effective. On the other hand, it must be remembered that a perpetual succession of treaties may be said to generate new usage, which will then become a source of rights independent of treaty. It is very doubtful, however, whether that stage could fairly be said to have been reached with respect to the navigation of

inter-State rivers at the time of the controversy; and there is some divergence of opinion as to whether it can be said to have been reached even now. Much difference of opinion also exists as to what precisely is meant by an "imperfect right". This term is commonly applied to some claim to an advantage purporting to rest on natural justice (*b*), but which is really based rather on comity than law, and which, if violated, would scarcely warrant a resort to force, or, indeed, to any other mode of redress than bare retorsion. Other writers, however, incline to regard it as a claim which is essentially legal in its nature; but which, by reason of its extremely general character, requires to be regulated and defined by treaty; although a total denial of it would give a *legal* title to redress (*c*). The difficulty, of course, lies in recognising as a "legal" right what is after all only a claim to a conventional concession, as to the terms of and restrictions on which—the right being admittedly imperfect—the contracting parties may reasonably be supposed and allowed to differ. Such a right, moreover, in so far as it can be said to subsist in relation to rivers, is, it is submitted, not a natural or original right, but the outcome of modern usage, and especially of the usage of the nineteenth century, by which the more important rivers were opened to navigation—although in varying degrees—by means of treaty and convention.

The Ownership and Use of Navigable Rivers.—Apart from convention, the principles which govern the ownership and use of navigable rivers appear to be these: (1) Where it lies wholly within the borders of one State, a navigable river will form part of the territory, and be subject to the exclusive control of the territorial Power; although in comity, or sometimes by convention, a right of navigation is commonly conceded to other States for the purposes of access as distinct from local trading. So the United States admits foreign vessels to the waters of the Mississippi, but does not concede this as a matter of right (*d*). (2) Where a navigable river constitutes the boundary between two States, each will be deemed to have dominion and jurisdiction over the river within its own borders, the line of demarcation being presumed to run through the middle of the deepest channel (*e*), subject, however, to a common right of user and navigation over the whole river (*f*). (3) Where a navigable river passes through the territory of two or more States, then each State will be deemed to have both dominion and

(*b*) Meaning, 'presumably, that sense of fairness and reasonableness which may be said to be the common property of civilised mankind.

(*c*) See Westlake, i. 153.

(*d*) Hall, 171.

(*e*) As to the rule of the *Thalweg*, see Westlake, i. 141; *New Jersey v. Delaware*, 291 U. S. 361 (1934); Briggs, *Law of Nations, Cases, Documents and Notes*, 1938, p. 183.

(*f*) See *The Twee Gebroeders*, 3 C. Rob. 336; *The Apollon*, 9 Wheat. 362; and *Handly's Lessee v. Anthony*, 5 Wheat. 374; Scott, 277.

jurisdiction over those parts of the river that lie wholly within its territory; and in principle, and for the reasons mentioned below, this would seem to carry with it a right to prohibit their navigation by vessels belonging to other States and their subjects. But, as will be seen hereafter, this right is now subject to two qualifications. In the first place, a right of navigation in such cases is now commonly conceded by treaty—almost invariably as regards riparian States, and frequently also as regards other States. In the second place, it would seem that, apart from treaty, although in virtue of usage generated by treaty, there is, in such cases, probably an “imperfect right” of navigation over waters otherwise territorial; although it is, as we shall see, somewhat difficult to determine the precise character and extent of this right. Meanwhile it will be desirable to glance briefly at the various treaties which have been made on this subject; both for the purpose of ascertaining the position of particular rivers, the navigation of which is regulated by treaty—and also for the purpose of arriving at some general conclusion as to how far the rules that would otherwise apply can be said to have been modified by new usage originating in treaty.

The Right of Navigation as affected by Treaty.—Strictly, and apart from treaty, it would seem, as has already been suggested, that any State is entitled either to prohibit or to regulate the use of all rivers or parts of rivers that lie wholly within its territory; this being a necessary deduction from the fundamental principle of territorial sovereignty, which must be deemed to apply except so far as it can be shown to be qualified or limited by some definite and generally accepted usage. It was from this principle that international law started; and for a long time current usage, despite some conventional relaxations, conformed thereto (*g*). But during the nineteenth century considerations of policy and convenience led to many mitigations in the exercise of this strict right; with the result that most of the more important navigable rivers have now come to be opened up by treaty (*h*).

The Opening up of the European Rivers.—By the Final Act of the Congress of Vienna, 1815 (*i*), it was agreed that the navigation of the rivers separating or traversing the different States should be free from the point at which each river became navigable to the point of its discharge into the sea, subject, however, to reasonable and uniform navigation dues, which were to be such as not to discourage commerce, and which, once fixed, were not to be altered save by agreement of the riparian States (Art. 111). The right conceded was also subject to regulations of police, which were, however, to be uniform for all and as favourable as possible to the commerce of all nations (Art. 109). Special regulations were further provided with respect to the navigation

(*g*) Hall, 169.

(*h*) Taylor, 282.

(*i*) Annexe 16.

of the Rhine, the Scheldt, the Meuse, and certain other rivers; whilst for the rest it was left to the various States concerned to give effect to these principles by arrangement between themselves (*k*). At the same time it does not appear that it was intended to assert a general right of free navigation, or even to extend the conventional right to the case of rivers wholly within the territory of one State (*l*). In the result, however, by a series of conventions made with respect to particular rivers, most of the European rivers, including the Rhine, the Scheldt, the Elbe, the Vistula, the Dniester, the Pruth, the Po, the Douro, and the Danube, have now been opened up to navigation, in all cases as between the riparian States, and for the most part, or in effect, also to the commerce of non-riparian States (*m*)

(i) *The Rhine*.—The free navigation of the Rhine was provided for by the Treaty of Paris, 1814, and also by special articles annexed to the Final Act of the Congress of Vienna, 1815. The actual exercise of this right was subsequently obstructed by a claim on the part of Holland to impose tolls on vessels navigating the lower channels giving access to the sea. This claim was based on the ground that these channels were really artificial waterways, and not a part of the river; and also on the ground that the waterway below Gorcum, including the mouth of the Meuse, really constituted an arm of the sea (*n*). After protracted negotiations this question was finally settled by a convention concluded at Mayence in 1831 between the various riparian States, by which the river was declared to be free from the point at which it becomes navigable into the sea (*bis in die See*), including its two principal outlets in the territory of Holland (*o*). But the freedom for non-riparian States was only theoretical. In consequence of the view expressed by the Congress of Paris, 1856, that the right of all merchantmen to free navigation on international rivers was part of "European Public Law", this right was conceded by the Convention of Mannheim, 1868. This concession was, however, whittled down by regulations imposing restrictions practically excluding non-riparian States. By the Peace Treaty, 1919 (*p*), pending a general convention, the Convention of Mannheim remained in force, subject to the provisions of the Treaty, whereby "vessels of all nations and their cargoes shall have the same rights and privileges as those which are granted to vessels belonging to the Rhine navigation and to their cargoes". The obnoxious restrictions were abolished. These provisions of the Treaty also applied to the Moselle. In 1936 a convention regulating the navigation of the Rhine was entered into by all the interested States, except Holland. The same year, however, Germany denounced

(*k*) Phill. i. 229.

(*l*) Taylor, 283; but see Westlake, i. 157.

(*m*) On the subject generally, see Westlake, i. 142; Taylor, 282.

(*n*) See Wheaton (Boyd), 295.

(*o*) *Ibid.*, p. 297.

(*p*) Arts. 354-362. See Kaeckenbeeck's *International Rivers*, 62-71.

Part XII of the Treaty of Versailles concerning the Commissions of the Rhine, Danube, Elbe, and Oder.

(11) *The Danube*.—By the Treaty of Paris, 1856, it was agreed between the contracting parties (g) that the principles established by the Congress of Vienna with respect to the navigation of European rivers should for the future be applied to the navigation of the Danube; and that this arrangement should be regarded as forming part of the public law of Europe. The river was to be free from all tolls and imposts other than those provided for by treaty, but subject to reasonable regulations of quarantine and police necessary for the safety of the States separated or traversed by the river; provision was made for the appointment of a European commission to carry out and maintain the works necessary to navigation on a portion of the river immediately adjoining its mouths with power to levy tolls for the purpose of meeting the expenses of the works; as well as for the appointment of a commission of representatives of the riparian Powers to superintend navigation (Arts. 15 to 19) on the whole stream. The rules for navigation drawn up in 1858 by the riparian commission did not secure the acceptance of the non-riparian Powers, and hence the European commission whose work was originally envisaged as temporary had its existence prolonged and its sphere of action extended. In 1868 the works and establishment of the European commission were declared to be neutralised. By the Treaty of London, 1871, some of the stipulations of the earlier treaty were revised; but otherwise the existing system, including the reservation of the right of Turkey, as territorial Power, to send warships into the river, was maintained (r). During the Russo-Turkish War of 1877 the free navigation of the Danube was for some time impeded by the operations of the belligerents; but in the discussion which ensued it appears to have been admitted that the existing international arrangements did not imply any absolute neutralisation of the waterway, or, indeed, any further obligation on the part of the belligerents than that of respecting the works and establishment of the commission, and of restricting freedom of navigation as little and of restoring it as speedily as possible. By the Treaty of Berlin, 1878, however, all existing fortresses on the river from the Iron Gates downwards were required to be razed, and no new ones were to be erected and within the same limits no vessels of war, except certain light vessels for police and customs purposes, were to be allowed to navigate the river (Arts. 52 to 57). By the same treaty Rumania was added to the European commission and its sphere of operations extended up to Galatz. The powers of the European commission have been continued from time to time by other treaties (s). By the Peace Treaty, 1919, the Danube from Ulm; the Elbe from its confluence with the Vltava;

(g) These included Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey.

(r) Arts. 4 to 7. Certain new regulations were also made in 1875; Phillimore, i. 233.

(s) In 1883 and 1904.

the Vltava from Prague; the Oder from its confluence with the Oppa; the Niemen from Grodno; and the Rhine-Danube navigable waterway when constructed—are declared international rivers. On these waterways the national property and flags of all Powers are accorded perfect equality of treatment (t). The Peace Treaties of 1919–20 envisaged a new administrative body for the Danube. This was set up by a convention of 1922, establishing a Definite Statute for the Danube. The Powers of the European commission were confirmed over the “maritime” Danube from Braila to the Black Sea, but a new international commission composed of representatives of the riparian Powers as well as of Great Britain, France, and Italy, came into being, with jurisdiction over the river from Ulm to Braila. The Second World War has destroyed the working of both commissions. Russia has been traditionally opposed to international control of the Danube, and in 1940 carried on negotiations with Germany for modification of the former arrangements. The commissions have never been legally dissolved, but with Russian influence predominant along most of the course of the Danube their functions are in abeyance, and the future position wholly unsettled (u).

The Opening up of Non-European Rivers.—In North America the free navigation of the rivers of Alaska was conceded as between Great Britain and the United States by a treaty of 1871; and that of the St. Lawrence by treaties of 1854 and 1871. In South America the waters of the Amazon and certain other rivers were opened to the navigation of all States, riparian and non-riparian, by a decree of 1867. The internal waters of Uruguay were similarly opened to all vessels by a decree of 1853. In Africa the navigation of the Congo, the Niger and their tributaries was declared to be free and open to all nations by the Final Act of the Berlin Conference of 1884–85; all differential dues being forbidden, and a special international commission being appointed to supervise their navigation (a). This Act has been repealed by the Convention of St. Germain (b), whereby complete freedom to all nations has been re-created and new rules, according to the original or acceding members the full benefit in practice of all the privileges conferred by the Final Act. In Asia, the opening up of the Yang-tse-kiang river by China to foreign vessels has also been conceded by treaty, subject, however, to certain conditions. This was originally conceded to British merchant vessels in 1862, but was gradually extended to those of other States, and was in 1898 made general, subject to goods being landed and shipped at certain specified ports (c). In 1921 an important conference held under the auspices of the League of Nations at Barcelona produced a general “Convention and Statute on the

(t) Articles 331–353; and on the Barcelona Convention of 1921 see Oppenheim, i. 367.

(u) *The Times*, July 5, 1946.

(a) Westlake, i. 155.

(b) Treaty Ser. No. 18 (1919), C3, 477.

(c) Hall, 172.

Regime of Navigable Waterways of International Concern". Forty States sent representatives, but absentees included the United States, Russia, Argentina, and Turkey. The Convention received many ratifications. Subject to exceptions as to cabotage, and navigation of war-ships and public ships, the contracting parties agreed to accord to the ships of each other free navigation on those parts of navigable waterways which are within their jurisdiction. There was to be perfect equality of treatment for all—no dues other than equitable charges for services rendered were to be exacted, and the contracting Powers undertook as far as possible to maintain the existing facilities for navigation. Provision was made for the settlement of disputes concerning the convention through the League Organisation for Communications and Transit, or in the last resort by the Permanent Court of International Justice (*d*).

General Conclusions with respect to Navigation of Rivers.—Thus we see that the practice of nations, so far as evidenced by convention, has during the last century been almost uniformly favourable to the right of free navigation. But although the fact that this right has been commonly conceded by treaty serves for the most part to remove any difficulty as to the actual position of rivers that are the subject of treaty stipulations, yet the practice on this subject is not by any means uniform, and it is not easy to determine how far the earlier rules that would otherwise apply have been affected or modified by treaty. Nevertheless the following conclusions appear to be warranted: (1) So far as relates to the right of navigation on the part of co-riparian States, the practice of States is perhaps sufficiently uniform to warrant the assertion of a right apart from treaty; although this right is at best only an "imperfect right", and is even now not universally conceded. So, in 1906, the navigation of the Lower Nile was closed by Egypt to the passage of steamers for ports of the Congo Free State, situated on the Upper Nile; nor does the legality of this proceeding appear to have been questioned. (2) Such a right, moreover, whether resting on convention or usage is certainly subject to such regulations as may be necessary to the safety or convenience of the territorial Power, so long as they are not inconsistent with free navigation. (3) So far as relates to the right of navigation on the part of non-riparian States, this, although often conceded by treaty, cannot probably be claimed as a right grounded on usage, except under cover of the rights of the riparian States themselves. (4) So far as relates to rivers wholly within the territory of one State, the right of navigation, although often conceded by treaty, and sometimes extorted as against minor Powers, is yet strictly only a matter of grace or comity (*e*). The position has, however, by virtue of treaty provisions

(*d*) For further provisions, Oppenheim, i. 367.

(*e*) On the subject generally, Hall, 163; Westlake, i. 157; and Kaeckenbeeck (International Rivers).

moved steadily in the direction of freedom of navigation in fact on all the chief navigable waterways of the world.

THE FREEDOM OF THE SEA

THE BEHRING SEA ARBITRATION, 1893

[British and Foreign State Papers, vol. 9 (1821-22); vol. 12 (1824-25); vol. 57 (1866-67); vol. 79 (1887-88); vols. 81-90 (1888-89 to 1897-98); *La Ninfa* (75 Fed. 513; Scott and Jaeger, p. 302); T. B. Browning. L. Q. R. April and October, 1891.]

THE territory of Alaska is a promontory situated on the extreme north-west of the continent of North America, and projecting in a south-westerly direction for about 500 miles into the Pacific Ocean. Beyond its extreme points lies the Aleutian Archipelago, a series of islets extending for a considerable distance further into the Pacific. Above these lies the Behring Sea, and still farther north lie the Behring Straits.

Both the peninsula of Alaska and the Aleutian Archipelago formerly belonged to Russia. In 1821 a ukase was issued by the Czar, purporting to reserve to Russian subjects the pursuits of commerce, whaling, fishery, and all other industry, on all islands, ports and gulfs, from the Behring Straits along the American coast as far as 51° N. lat., and also from the Aleutian Islands to the eastern coast of Siberia, and along the coast of Asia as far as 45° 50' N. lat., all foreign vessels being prohibited from approaching within 100 Italian miles of these limits under pain of confiscation. This claim to maritime dominion and jurisdiction over the open sea was at once objected to both by the United States and Great Britain. Mr. Adams, the United States Secretary of State, in particular, expressed his surprise at the attempt to exclude American citizens "from the shore beyond the ordinary distance (of three miles from low-water mark) to which the territorial jurisdiction extends" (f), and refused altogether to admit these pretensions (g). As the result of these protests, Russia ultimately agreed, by conventions entered into with the United States in 1824, and with Great Britain in 1825, to abandon these claims, and not to prevent

(f) February 25, 1822.

(g) July 22, 1823.

the citizens and subjects of the United States and Great Britain from navigating or fishing in any part of the Pacific Ocean; whilst as between Great Britain and Russia certain limits of settlement and lines of demarcation of boundary were also agreed upon.

By a treaty made in 1867 Russia ceded to the United States, in consideration of a money payment, all her dominions on the continent of America, including the territory of Alaska and the adjacent islands, and all attendant rights therein. The territory was thereupon constituted a federal territory of the United States, and became subject to the dominion and jurisdiction of the latter Power. The main value of the territory, at this time, consisted in its being the chief seat of the fur-seal fishing industry. In 1870 a small but powerful syndicate, known as the Alaska Commercial Company, acquired from the United States Government a lease of the islands of St. Paul and St. George, on certain terms, mainly with a view to the carrying on of the fur-seal fishery. The same company appears subsequently to have extended its operations and control to other islands, and also to the mainland of Alaska. Meanwhile the seal fishery had begun to attract the attention of the Canadians, and Canadian vessels now began to engage in it. The method followed, in most cases, was to intercept and kill the seals in their passage across the Behring Sea. These operations, although they involved a wasteful slaughter of seals, took place at a distance greatly beyond three miles from the American shore; and occurring as they did outside waters commonly regarded as territorial, and on the open sea, were not, according to the ordinary rules of international law, subject to the municipal regulations or jurisdiction of any foreign State. But they necessarily conflicted with the interests of the Alaska Company, which throughout the whole of these proceedings showed itself to be possessed of powerful influence at Washington. Hence an Act of Congress—section 1956 of the revised statutes—was passed, providing, in effect, that no person should kill any fur-seal, or other fur-bearing animal, without authorisation, “within Alaska territory or the waters thereof”. At the instigation of the Alaska Company, and purporting to act under the authority of this provision, the United States authorities. in 1886. seized three Canadian vessels,

whilst at a distance of seventy miles from the shore, and proceeded against the vessels and their crews, in the District Court at Sitka, for a contravention of the United States law. On the intervention of Great Britain, and after much delay, orders were issued by the United States Government for the release of these vessels and their crews, although this relief was given for the most part under circumstances which rendered it futile. In 1887 other seizures were made, which gave rise to a further protest on the part of the British Government. In 1889 a new Act of Congress was passed, providing that the previous enactment—section 1956—should be deemed to include and apply to “all the dominion of the United States in the waters of Behring Sea”, and that it should be the duty of the President to issue a proclamation “warning all persons against entering said waters for the purpose of violating the provisions of said section”. Such a proclamation was accordingly issued in March, 1889, with the result that in July the seizures of British vessels were renewed. In reply to protests of the British Government, the United States Secretary of State contended, amongst other things, that the law of the open sea and the liberty it conferred could not be perverted to justify acts immoral in themselves (such as the taking of the seals); that the seal fishery had been under the exclusive control of Russia, to whose rights the United States had now succeeded; that the taking of seals in the open sea tended to their extinction (*h*); that the freedom of navigation and fishery conceded by Russia in 1825 “in the Pacific Ocean” did not include the Behring Sea; that the prohibition to approach within 100 Italian miles had been left unimpaired, and had been acquiesced in by Great Britain, and that this jurisdictional right had now become vested in the United States (*i*). In support of the United States claim to the 100-mile restriction, Mr. Blaine referred to a British Act passed after the confinement of Napoleon at St. Helena, forbidding ships of any nationality from hovering within eight leagues of the coast, and also to extraterritorial legislation under the Federal Council of Australasia Act, 1885. In reply, Great Britain contended that seals were animals *feræ naturæ*; that their pursuit on the open sea could not be regarded as immoral; that in any case the

(*h*) January 22, 1890 (82 S. P. 202).

(*i*) June 30 and December 17, 1890 (82 S. P. 257; 83 S. P. 309).

seizure of vessels on the high seas, in time of peace, was justified only in cases of piracy or by special international agreement; that the fact that competition in seal fishing would impair the value of the monopoly of the United States lessees did not justify the United States in forcibly depriving other nations of a share in the industry; and, finally, that Great Britain had categorically denied the claims of Russia, under the ukase of 1821, immediately on its appearance. In 1890, after several fruitless attempts at amicable settlement, Great Britain took up a firm stand and intimated that any further seizures would be resisted by force (k). In consequence of this the Government of the United States abstained from making any further seizures, although it refused to give any diplomatic assurance that none would be made in future. In 1891 a *modus vivendi* was arranged with a view to the whole question being submitted to arbitration, and this arrangement was subsequently renewed from time to time down to May, 1894 (l). Meanwhile, as the result of further negotiation, a treaty was ultimately signed at Washington on February 29, 1892, providing for a reference of the questions in issue between the two countries to a tribunal consisting of seven arbitrators, two to be appointed by Great Britain, two by the United States, whilst France, Sweden-Norway, and Italy were to be requested to appoint one each. The award was to embrace a distinct decision on each of the points hereinafter mentioned. If under the award it should appear that the concurrence of Great Britain was necessary to the establishment of regulations for the protection of the seal fishery, then the arbitrators were to determine what concurrent regulations should be made; whilst the contracting parties also agreed to co-operate in procuring the adhesion of other Powers to such regulations. The parties being unable to agree upon a reference which should include a determination of the question of the liability of each for injuries alleged to have been sustained by the other party or its citizens, it was agreed that each should be at liberty to submit to the arbitrators any questions of fact, and to ask for a finding thereon, the question of liability on the facts so found being left as a subject for further negotiation.

(k) June 14, 1890 (82 S. P. at 275).

(l) These arrangements, so far as Great Britain was concerned, were carried into effect by virtue of the Seal Fishery (Behring Sea) Acts, 1891 and 1893, and certain Orders in Council issued thereunder.

The Arbitration and Subsequent Proceedings.] The arbitrators appointed were Lord Hannen, an English Judge, and Sir John Thompson, Minister of Justice and Attorney-General of Canada, on the part of Great Britain; Mr. Justice Harlan and Senator J. T. Morgan, on the part of the United States; Baron de Courcel, Senator and Minister, by France; Senator the Marquis Visconti Venosta, Senator and formerly Minister of Foreign Affairs, by Italy; and M. Gregors Gram, Minister of State, by Sweden-Norway. The arbitrators met at Paris in 1893, and made their award on August 15 in that year. The questions submitted for decision, and the finding of the arbitrators thereon, were respectively as follows :

1. What exclusive jurisdiction in the sea known as the Behring Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

Finding : Although Russia had claimed extensive jurisdiction by the ukase of 1821, yet in the course of the negotiations which led to the treaties of 1824 and 1825 she admitted that her jurisdiction in the Behring Sea should be restricted to the reach of cannon-shot from the shore; and that from that time down to the cession of Alaska she never asserted or exercised in fact any exclusive jurisdiction in the Behring Sea, or in the seal fisheries, beyond the ordinary limit of territorial waters.

2. How far were these claims of jurisdiction as to the seal fisheries recognised and conceded by Great Britain?

Finding : Great Britain did not recognise or concede any claim upon the part of Russia to exclusive jurisdiction outside the ordinary territorial waters.

3. Was the body of water now known as the Behring Sea included in the phrase "Pacific Ocean" as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after the said treaty?

Finding : The Behring Sea was included in the phrase "Pacific Ocean" as used in the treaty of 1825; but (by a majority) that no exclusive rights of jurisdiction thereover, or exclusive rights as to the seal fisheries, were held or exercised thereafter by Russia, beyond the ordinary limit of territorial waters.

4. Did all the rights of Russia as to jurisdiction and as to the

seal fisheries in the Behring Sea, east of the water boundary, in the treaty between the United States and Russia of March 30, 1867, pass unimpaired to the United States under that treaty?

Finding : Yes.

5. Has the United States any right, and, if so, what right, of protection or property in the fur-seals frequenting the islands of the United States in the Behring Sea, when such seals are found outside the ordinary three-mile limit?

Finding (by a majority) : The United States had no right of protection or property in the fur-seals when found outside the ordinary three-mile limit.

The concurrence of Great Britain being therefore necessary to the regulation of the fishery, the tribunal proceeded to draw up a set of regulations, to be enforced by both parties, for the protection of the fur-seal industry. These included : (1) The absolute prohibition of all sealing within a zone of sixty geographical miles around the Pribyloff Islands. (2) The establishment of a close season extending from May 1 to July 31 in each year, in that part of the Pacific Ocean, including the Behring Sea, which is situated north of 35° N. lat., and east of 180° W. long., till it strikes the water boundary described in Article 1 of the treaty of 1867, following that line up to the Behring Straits. (3) The adoption of a rule requiring that, during the open season, only sailing vessels should be employed in seal fishing, each vessel being required to have a special licence and to carry a distinguishing flag. (4) The prohibition of the use of nets, firearms, and explosives, saving that shot-guns might be allowed outside the Behring Sea during the open season. These regulations were further to be submitted to a new examination every five years. The regulations, as prescribed by the arbitrators, were subsequently given effect to by Great Britain, by the Behring Sea Award Act, 1894; and by the United States, by an Act of Congress of April 6, 1894.

The arbitrators also found as authentic a statement of facts submitted by Great Britain, showing that between 1886 and 1894 there had been fourteen seizures of British sealing vessels, made at distances ranging from 15 to 115 miles from the coast, that one such vessel had been arrested in Neale Bay, and that two others had been arrested and three ordered out.

It now remained only to settle the question of damages.

After some ineffectual efforts it was finally agreed, under a convention, signed at Washington on February 8, 1896, that all claims on account of injuries sustained by persons on whose behalf Great Britain was entitled to claim compensation from the United States, arising either under the treaty, the award, or the findings of fact, together with certain other specified claims, should be referred for determination to two legal commissioners, one to be appointed by each party; any amount awarded to be paid to Great Britain within six months. Such commissioners were afterwards duly appointed; and on December 17, 1897, made an award under which the damage sustained by Great Britain was assessed at \$464,000; and that amount, together with interest at 6 per cent., ordered to be paid by the United States.

These regulations for the protection of seals proved quite ineffectual; and accordingly by the Convention of Washington, 1911, between Great Britain, U.S.A., Russia and Japan, seal fishing within a defined area, including the Behring and Kamschatka Seas and the Seas of Okhotsk and Japan, outside territorial waters was prohibited.

In the Behring Sea arbitration the questions submitted for decision, although largely questions of fact or interpretation, were really directed towards a larger issue, viz., whether the waters of the Behring Sea, which, according to all recognised standards, constituted a part of the open sea, could, under the special circumstances of the case, or for certain special purposes, be said to be subject to the sovereignty, the jurisdiction, or the municipal regulations of the United States. It was, in fact, a new effort made by a great Power, under special conditions, and at the instance of a powerful corporation, to challenge the freedom of the open sea. This attempt was, on the findings of the tribunal, happily defeated. At the same time, the defeat was mitigated greatly, from the point of view of the United States, by the obligations imposed by the arbitrators with respect to the future protection of the seal-fishing industry. These gave to the United States in fact, and by virtue of combined treaty and municipal regulation, many of those privileges which that country had previously assumed to extort as a right. The restrictions imposed by the regulations are, however, only incumbent on the citizens or subjects of the contracting parties. Each Power, indeed, binds itself to attempt to secure the adhesion of other Powers to these regulations; but so far only one Power, Italy, appears to have assented.

A somewhat similar controversy between Great Britain and Russia, arising out of the seizure by the latter, in the North Pacific, in 1892, of certain British sealing vessels, was also settled by an agreement; whereby Great Britain undertook to prohibit sealing by British subjects within a zone of ten marine miles following the sinuosities of the Russian coasts, and also within a zone of thirty marine miles from the shore of certain islands; Russia, on her part, agreeing to limit her catch upon or around these islands to 30,000 skins for the year. These arrangements were given effect to by the Seal Fishery (North Pacific) Act, 1893, now 1895, and certain Orders in Council made thereunder.

The Commonwealth of Australia Constitution Act, 1900, s. 51, sub-s. 10, confers on the Federal Parliament a right to legislate as regards fisheries in Australian waters beyond territorial limits. The meaning of this provision is not altogether clear. If, as is probable, it is merely intended to confer a right of regulating the fisheries outside territorial waters in relation to British vessels and subjects, then it would seem to constitute a perfectly valid authority for such an extension of the domestic law; but under no circumstances can it be regarded as conferring a right to interfere with the vessels and subjects of other nations outside the limits of territorial waters, in derogation of what we have seen to be a fundamental principle of the law of nations.

The Doctrine of the Freedom of the Sea, and its Qualifications.—

The doctrine of the "freedom of the sea" is subject to two sets of qualifications. In the first place, certain parts of the sea adjacent to or attendant on the territory of a State, and for this reason commonly styled "territorial waters", are subject alike to the sovereignty and jurisdiction of the territorial Power. Such waters comprise: (1) the littoral or marginal sea, extending as far as three miles from low-water mark; (2) inlets, exhibiting a well-marked configuration, as gulfs or bays; (3) straits not exceeding six miles in breadth; and (4) inland seas. In the second place, for the purpose, in some cases, of obviating that condition of lawlessness which would otherwise arise, or, in other cases, of enabling the due enforcement of belligerent rights, every State is entitled to exercise a jurisdiction,—which may be styled perhaps "personal" or "quasi-territorial", according to the nature of the case,—on the high seas: (1) over all vessels belonging or purporting to belong to it and flying its flag, whether public or private, together with those on board; (2) over pirates, as being the common enemies of mankind; (3) over private vessels belonging to other States which have committed some violation of its municipal law and have been pursued on to the high seas (hot pursuit) (*m*); (4) over vessels belonging to other States which are reasonably believed to be engaged in an attempt to infringe its sovereignty or safety; and (5) over vessels

belonging to other States, in cases where such a right has been conceded by treaty. Finally, (6) in time of war a belligerent is entitled to exercise a right of visit and search, together with such further jurisdiction as may be warranted, over the private vessels of neutrals, for the purpose of preventing or punishing certain violations of neutral duty, such as the carriage of contraband, the breach of blockade, and acts of unneutral service. All these cases will be considered hereafter, in connection with the topics to which they respectively belong. Apart from these cases, moreover, the use of the open sea by the vessels of all States is also subject to the observance of certain rules of navigation, which are primarily rules of municipal law, but which have now for the most part been rendered uniform as between the principal maritime States (*n*).

Zones of the Sea.—These would seem to be three: (1) A zone properly called territorial waters which the nations assimilate to their own territory; (2) A zone for which the name *maritime approaches* is proposed, wherein a nation claims to exercise and does in fact exercise various forms of authority; and (3) the high seas in which no one claims any exclusive jurisdiction save for the space momentarily occupied by his own ship (*o*).

TERRITORIAL WATERS:

(i) THE LITTORAL SEA

THE QUEEN v. KEYN

46 L. J. M. C. 17; (1876), 2 Exch. Div. 63.

THE prisoner, Ferdinand Keyn, was indicted at the Central Criminal Court for the manslaughter of Jessie Dorcas Young. The deceased, in February, 1876, was a passenger on board the British steamer "Strathclyde", on a voyage from London to Bombay. When off Dover the "Strathclyde" was run down by the "Franconia", a German vessel under the command of the prisoner, a German subject. The "Strathclyde" was sunk, and the deceased, together with several others of the passengers and crew, was drowned. The point at which the collision occurred was 1 9-10ths miles from Dover Pier-head, and within 2 1-7th miles from Dover beach. The "Franconia" having put into an English port, Keyn was arrested, and subsequently

(*n*) See Oppenheim, i. 477, and the Safety of Life at Sea Conventions.

(*o*) Grey, L. Q. R., July, 1926.

brought to trial. At the trial it was alleged and found that the collision was due to the negligence of the prisoner as master of the "Franconia", and he was accordingly found guilty of manslaughter; but the question whether the Court had jurisdiction to try the case was reserved for the consideration of Crown Cases Reserved.

The legality of the conviction was contested on the ground that the accused was a foreigner commanding a foreign vessel on a voyage from one foreign port to another; that the offence was committed on the high seas; and that the accused was consequently not amenable to the jurisdiction of the English Courts. It appeared that ~~criminal jurisdiction~~ at common law was originally distributed between two tribunals, the Courts of Oyer and Terminer taking cognisance of offences committed within the body of a county, and the Court of the Lord High Admiral of those committed on the sea. Each Court claimed concurrent jurisdiction over offences committed on rivers or arms of the sea within the body of a county. By 15 Ric. 2, c. 3, the Admiral's jurisdiction was limited to cases of death or mayhem "done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh unto the sea"; this, however, being in addition to his jurisdiction over "a thing done upon the sea". By 28 Hen. 8, c. 15, all treasons and felonies committed in or upon the sea, or in any haven, creek, river, or place where the Admiral had jurisdiction, were to be tried in such shires and places as might be limited in the King's commission, which for this purpose was to be in like form as for offences committed on land. The result of this statute was to transfer jurisdiction in such cases from the Lord High Admiral to the Commissioners of Oyer and Terminer, amongst whom was included the Judge of the Admiralty Court, and to make such offences triable by ordinary process. By 39 Geo. 3, c. 37, the provisions of 28 Hen. 8, c. 15, were extended to all offences committed on the high seas, out of the body of any county. Ultimately, by 4 & 5 Will. 4, c. 36, and by 7 & 8 Vict. c. 2, this jurisdiction was vested in the Central Criminal Court and the Judges of Assize. In this manner offences originally within the Admiral's jurisdiction became triable by the ordinary law of the land and before the ordinary Courts. This being so, the question in the present case was whether the

jurisdiction originally vested in the Admiral, and now vested in the Central Criminal Court and the Judges of Assize, included jurisdiction over an offence committed by a foreigner, on board a foreign vessel, within three miles of the English shore. It was decided, by a majority of the Court for the Consideration of Crown Cases Reserved, that, according to the law of England, no such jurisdiction existed, and that the conviction accordingly could not be sustained.

Summary of Judgments.] On the argument of this question, the Court, by a majority—including Cockburn, C.J., Kelly, C.B., Bramwell, L.J., Lush and Field, JJ., Sir R. Phillimore and Pollock, B.—held that prior to 28 Hen. 8, c. 15, the Admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles from the shore of England, and that 28 Hen. 8, c. 15, and subsequent statutes only transferred to other Courts such jurisdiction as had formerly been vested in the Admiral. Kelly, C.B., and Sir R. Phillimore came to the same conclusion on the further ground that at international law the power of a nation over the sea within three miles of its coast existed only for certain limited purposes, namely, for the defence and security of the adjacent territory; and that Parliament could not consistently with these principles have intended to apply English criminal law within those limits.

The judgment of the majority was dissented from by Lord Coleridge, C.J., Brett and Amphlett, L.JJ., and Grove, Denman, and Lindley, JJ., on the ground that the sea within three miles of the coast constituted part of the territory of England; that the English criminal law extended over those limits; and that the Admiral had formerly jurisdiction to try offences there committed, although on foreign ships. Coleridge, C.J., and Denman, J., also upheld the jurisdiction of the Court on the further ground that the prisoner's ship having run into a British ship and sunk it and so caused the deceased's death, the offence must be deemed to have been committed on board a British ship.

Judgment of Cockburn, L.C.J.] In his judgment the Lord Chief Justice stated, in effect (*p*), that, as a general rule, and in default of express enactment, a person could not be made

amenable to the criminal law of England, unless the offence complained of was committed either in British territory, or on board a British vessel. Hence the offence in the present case would not be subject to the jurisdiction of the Court, unless it was to be regarded as having been committed within British territory, by reason of its having taken place within the three-mile limit; or unless it was to be regarded as having been committed on board a British vessel, by reason of the death of the deceased having taken place there.

With respect to the three-mile limit, a certain jurisdiction had no doubt originally been claimed by the Crown over the narrow seas; but this had long since been abandoned, and could not now be brought in aid of what was virtually another doctrine. The latter doctrine was no doubt commonly put forward by the text-writers; but a careful examination of the writings of English, American, and Continental publicists showed that there was no consensus of opinion either as to local extent, or as to the nature of such jurisdiction. Some writers contended for a limit of three miles; others for a space covered by the range of cannon-shot. Some claimed for the territorial Power an absolute dominion; others a dominion subject to a *jus in re aliena*, or right of passage, on the part of other nations; others, again, denied any dominion, whilst asserting a more or less extensive jurisdiction—some for the purposes of safety and police, others for the enforcement of revenue laws and rights of fishery, whilst others drew a distinction between the case of a commorant and a passing vessel. Moreover, even if the opinions of such writers had been unanimous instead of altogether divergent, their opinions could not make law apart from the assent of civilised nations; whilst even if such assent could be proved it was very doubtful if such a principle as that now contended for, amounting as it did to a new law, could be applied by the Courts without the sanction of an Act of Parliament.

The question being, then, not one of theoretical opinion, but of fact, what evidence, either in the shape of treaties or usage, was there of such a principle? There was certainly no treaty which conferred such a jurisdiction over passing vessels; and although there were treaties which recognised a jurisdiction within this limit, as regards the enforcement of rules of neutrality and exclusive rights of fishery, this was apparently only a matter

of mutual concession and convention. So, also, certain usages were found to exist in relation to navigation, fishery, and neutrality laws, yet there appeared to be no usage warranting the application of the general law of the local State to foreigners on the littoral sea. It was quite possible that if such a law were expressly adopted it would be acquiesced in by other nations, and would then be attributable to acquiescence. Such a law would in any case be enforceable by the municipal Courts. An examination of the statutes relating to foreigners within the three-mile zone showed that, when Parliament meant to include foreigners for any purpose within its legislation, it had done so in express terms. But for the present purpose there was no such legislation, and in default thereof the Courts were not at liberty to apply the local criminal law to foreigners within the three-mile zone.

With respect to the contention that the offence must be deemed to have been committed within the jurisdiction, by reason of the death having taken place on board a British ship, he was of opinion that, if the defendant had purposely run into the "Strathclyde", then it might have been held that the killing of the deceased took place on board that ship; but when the death arose, as in the present case, only from the negligent navigation of the ship occasioning the mischief, he did not see how such act of negligence could be said to have occurred, either actually or constructively, on the ship on which the death took place.

Judgment of Lord Coleridge, C.J.] The learned Judge, in dissenting from the opinion of the majority (q), pointed out that if the offence was committed "within the realm", then there was jurisdiction to try it; and on the facts it was, in his opinion, committed upon English territory. The proposition contended for by the defence was that for an act of violence committed by a foreigner upon an English subject, within a few feet of low-water mark, the foreigner, unless on board a British ship, could not be tried. But by a consensus of writers, without one single authority to the contrary, some portion of the coast waters of a country was considered as part of its territory. And this was established as clearly as any proposition of international law

(q) At pp. 151 *et seq.*

could be. There was, it was true, as between sovereign States no common law-giver; and no tribunal had power to bind them by its decrees, or to coerce them if they transgressed. But the law of nations was a collection of usages which civilised States had agreed to observe in their dealings with each other (r). Whether a particular usage had or had not been agreed to was really a matter of evidence. Treaties and acts of State were but evidence of the agreement of nations, and did not in this country at least *per se* bind the tribunals. Neither, certainly did a consensus of jurists. Nevertheless, all this went to furnish evidence of the agreement of nations on international points; and on such points, when they arose, the English Courts gave effect to such agreement, as a part of English law. When they found a number of men of education, of many different nations, most of them uninterested in maintaining any particular thesis on the matter in question, agreeing generally for nearly three centuries in the proposition that the territory of a maritime country extended beyond low-water mark, he himself could hardly conceive stronger evidence that the territory of a maritime country did so extend. The learned Judge also expressed the opinion that, on the question of jurisdiction, this view was also borne out by judgments of eminent Judges such as Sir Edward Coke, Lord Stowell, Dr. Lushington, and others; and, further, that even Parliament had, in certain instances, legislated on the basis of the principle that the realm did not end with low-water mark.

The decision of the majority of the Court in *R. v. Keyn* was based on considerations peculiar to English municipal law rather than on international law. So far as the question immediately in issue was concerned, the conclusion arrived at was speedily corrected by the passing of the Territorial Waters Jurisdiction Act, 1878, which in its preamble declares that the jurisdiction of the Crown "extends, and has always extended, over the open seas adjacent to the coasts of the United Kingdom and of all other parts of her Majesty's dominions, to such a distance as is necessary for the defence and security of such dominions". Nevertheless, the judgment of Cockburn, L.C.J., is still noteworthy, both as embodying a critical examination of the doctrine of sovereignty over the littoral sea and as illustrating the attitude taken up by the English Courts towards rules of international law which, although commonly predicated by the text-writers on a basis of

(r) At p. 154.

usage, yet lack the confirmation of treaty, statute, or judicial decision. The judgment of Lord Coleridge is, however, equally noteworthy as adopting a view which is at once more liberal and more in conformity with the practice of other States. By the Territorial Waters Jurisdiction Act, 1878, it is enacted that an offence committed by any person within territorial waters shall be an offence within the Admiral's jurisdiction, although committed on a foreign ship. But proceedings under the Act against a foreigner, other than preliminary proceedings, are not to be instituted in the United Kingdom, except with the consent of a Secretary of State, and on his certificate that the institution of proceedings is expedient; or, in the colonies, except with the consent of the Governor, and on a similar certificate. It is provided, however, that the Act shall not affect any rightful jurisdiction under the law of nations, or conferred by statute or by existing law, in relation to foreign ships or persons on board them or the trial of any act of piracy (s). "Territorial waters" are defined as such parts of the sea adjacent to the coast of the United Kingdom or other part of British dominions as are deemed by international law to be within the territorial sovereignty of the Crown; and, for the purposes of offences under the Act, any part of the open sea within one marine league of the coast, measured from low-water mark (t). This Act serves to bring the English law, so far as relates to the exercise of criminal jurisdiction, into harmony with the usage of the majority of nations; but it does not appear to touch on the question of jurisdiction for civil purposes; whilst a study of its provisions discloses many latent difficulties (u). The three-mile zone is also commonly recognised as defining that territorial limit outside which the enactments of the Legislatures of British colonies and dependencies will not be operative, except under the authority of some Imperial statute (a). The laws passed for the preservation of neutrality are also made binding, both on subjects and foreigners alike, within "adjacent territorial waters" (b). Finally, there are waters known as the "exclusive fishery limits of the British Islands", within which the right of excluding or regulating fishing vessels is assumed by Parliament. These waters are defined by the Sea Fisheries Act, 1883, as that portion of the seas surrounding the British Islands within which her Majesty's subjects have by international law the exclusive right of fishing; and, when such limits are defined by any convention made with any foreign State, then the portion so defined (c). The question of extra-territorial legislation

(s) Sections 5 and 6.

(t) Section 7.

(u) For a criticism of these provisions, see Piggott, *Nationality*, i. 37, and ii. 193.

(a) See *MacLeod v. The Att.-Gen. of N.S.W.*, [1891] A. C. 455.

(b) See Foreign Enlistment Act, 1870, s. 2.

(c) See 46 & 47 Vict. c. 22, s. 28; and as to other sea fishery legislation, Piggott, *Nationality*, ii. 280 *et seq.*

generally, and the question of the right of arrest outside the three-mile limit for offences against municipal law, will be considered hereafter (d).

THE "I'M ALONE"

(1935), 29 A. J. I. L. 329; Briggs, p. 358; Scott and Jaeger, p. 362.

THE "I'm Alone" in 1929 had been a British ship of Canadian registry, employed for several years in rum-running into the United States of America in violation of the prohibition laws then in force in that country. On March 20, 1929, she was encountered by the U.S. coastguard vessel "Wolcott" off the coast of Louisiana, more than three miles but within one hour's sailing distance from the coast. She was therefore within the area in which, under the Anglo-American Treaty of 1924, the U. S. revenue authorities were permitted to visit and seize British ships engaged in violation of the prohibition laws. On being challenged, the "I'm Alone" made out to sea with the "Wolcott" in pursuit. The pursuer's gun became jammed, and a wireless message was sent calling for the help of another revenue cutter. On March 22, the cutter sent in answer to this call, the "Dexter", intercepted the "I'm Alone" when more than 200 miles from the United States coast. The "I'm Alone" still refused to stop, and was accordingly sunk by gunfire, the crew with one exception being rescued from the sea.

The Canadian Government claimed that the sinking of the "I'm Alone" was contrary to international law, and was not authorised by the Treaty in force concerning the enforcement of the prohibition laws. Accordingly, Joint Commissioners were appointed on behalf of the United States and Canada under the terms of the Convention of January 23, 1924, to investigate the incident, and make appropriate recommendations.

The United States contended that, even if the seizure was admittedly on the high seas, the pursuit had started within the

(d) As to the exercise of a jurisdiction over foreign vessels after arrival in port for offences committed on the high seas, see *P. d. O. Co. v. Kingston*, [1903] A. C. 471; and Customs Consolidation Act, 1876, s. 53. As to the Hovering Laws, now repealed, see Phill. i. 275; although the offence of "hovering at sea" still exists under the Customs law; see Customs Consolidation Act, 1876, ss. 179, 180, 181; also 50 & 51 Vict. c. 7, and 53 & 54 Vict. c. 56.

zone in which under the Treaty seizure was allowed, and that a hot pursuit had continued up to the time of the capture. The Canadian Government did not admit the existence of a right of hot pursuit in the circumstances of the case, and considered that in any event there had been no continuous pursuit by the ship which had effected the sinking—that ship being a fresh ship summoned from elsewhere to intercept after the pursuit had started.

Findings.] The Commissioners considered three questions in the first instance. They held that they were entitled to enquire into the beneficial or ultimate ownership of the “I’m Alone”. They deferred the consideration of the question whether a right of a hot pursuit existed, but they held that nothing in the Convention of 1924 legally justified the sinking of the ship. An interim report was rendered on June 30, 1933, and a final report on January 5, 1935—the final finding being that the sinking on the high seas could not be legally justified by any principle of international law. Hence the U.S.A. ought formally to acknowledge the illegality of the act, and pay to the Canadian Government a sum of \$25,000 as a material amend. As regards compensation to the owners, however, the Commissioners found that the ship, though of Canadian registry, was in fact owned by a group of persons who were almost all U.S. citizens who were employing the ship in liquor-running enterprises. Under those circumstances they held that no compensation was due.

This case was one of the series of cases arising out of the enforcement of the prohibition of import of alcoholic liquor into the United States. In response to British objections to the exercise of a wider jurisdiction, the United States had agreed in the Treaty of 1924 with Britain that the three-mile limit constitutes the normal boundary of territorial waters, but under the terms of the Treaty, search and seizure was allowed within a radius of one hour’s sailing distance of the coasts of the United States.

It appears to be now generally recognised that when there has been a violation of law by a foreign merchantman committed in the territorial waters of a State, the warships of the injured State may pursue the offender out to sea, and arrest it on the high seas (*e*). But the

(*e*) Oppenheim, i. 482; Jessup, *Law of Territorial Waters*, pp. 106-110; Gidel, *int.* pp. 339-360. See also *The Vinces*, 1927 20 F. (2d) 164; *The Pescawha*, Annual Digest, 1929-30, No. 86; *The Resolution*, *ibid.*, No. 87.

pursuit must have started when the ship pursued is still within the territorial waters. Whether such a right of "hot pursuit" exists in the case of violations of law committed by a ship outside territorial waters but within a zone in which under treaty search and seizure is allowed was raised in the *I'm Alone Case*, but left unanswered by the Commissioners. It is submitted that the powers given by the Treaty being in themselves an extension of principles accepted by the contracting parties as the general principles of international law ought not to be treated as capable of further extension without clear evidence that the parties intended to allow for that extension. Powers given constituting an exception to the general principles of international law should normally be interpreted restrictively. Thus in the case of *The Wanderer* (f), the British American Claims Arbitral Tribunal, 1921, held the U.S.A. liable for a seizure on the high seas on a *bona fide* but mistaken belief that the Behring Sea Seal Fishery Regulations rendered ships carrying guns which might be intended to shoot seals liable to arrest.

The Littoral or Marginal Sea.—Notwithstanding some divergence of opinion and practice with respect to its precise nature and extent, there appears to be no doubt that a certain strip of the marginal sea and its underlying soil are to be regarded as included in the territory of the adjacent State and as being subject to its sovereignty and jurisdiction, save only for the freedom of innocent passage accorded to the vessels of other nations (g). Such an extension of territory may be justified in principle, on the ground that such a zone is susceptible of appropriation and effective control from the adjacent shore, and that such appropriation is necessary for the purposes of safety and defence (h). It has also the sanction of usage, in so far as within this zone States do in fact enforce their own municipal law with respect to navigation, customs, and quarantine, and occasionally in restraint of the carrying on by foreigners of the coasting trade, that they do in fact enforce an exclusive right of fishery and prohibit hostilities or captures as between foreign belligerents and that most States also claim to exercise, in certain contingencies, a criminal jurisdiction over foreign subjects. The limit of this zone is also commonly recognised as extending to three miles from low-water mark, although some States claim a wider range of jurisdiction generally (i), whilst most States assert a wider range of jurisdiction for particular purposes (k).

Sovereignty over Territorial Waters.—The majority of writers appear to consider that a State has full sovereignty over its terri-

(f) Annual Digest, 1919-22, Case 120

(g) Oppenheim, vol. 1, 382

(h) See the award in the *Costa Rica Packet Case*, p. 298.

(i) Such as Spain and Norway.

(k) Hall, 192

torial waters. The Air Navigation Convention, 1919, Art. 1, recognising that every State has complete sovereignty over the air space over its territorial waters, supports this view. A minority of writers, however, maintain that the rights of control, jurisdiction, police, etc., which exist in such waters fall short of full sovereign rights. Certain decisions of French Courts appear to take this view. *Thireaut Case*, 1935 (R. I. xvii (1936), pp. 303-310), and the *Brest Cables Case*; *Compagnie Francaise des Cables Telegraphiques v. Administration Francaise des douanes*, A. D. 1938-40, Case No. 48. Lapradelle, *Revue Generale*, 1898, pp. 273-284 and 309-330.

The Extent of Territorial Waters.—There is no universal agreement in the practice of nations as to the limit of territorial waters. Both Britain and the United States adhere to the three-mile limit as the accepted rule of international law (*l*). Some States appear to favour the recognition, beyond waters regarded as strictly territorial, of a contiguous zone in which certain rights of jurisdiction may be exercised, but which is not to be regarded as subject to territorial sovereignty. It cannot, however, be said that sufficient general agreement exists for such a rule to be regarded as accepted international law. All that can be certainly stated is that it is recognised that within an area of sea up to three miles from the shore, a State may exercise full rights of jurisdiction. Certain States claim more, and argue that it is permissible for a State by unilateral action to extend its territorial waters to an extent reasonably necessary for the protection of its interests. It is submitted, however, that the sounder principle is that of the freedom of the seas, except where it has been limited by general assent, and that at present general assent stops short at the three-mile limit.

As regards the individual practice of nations for purposes of neutrality the three-mile limit has the greatest measure of support. At the Hague Codification Conference, 1930, it had the support of Great Britain and the British Dominions, the United States, France, Germany, Japan, Belgium, Holland, China, and Poland. Germany, Belgium, France, and Poland, however, qualified their acceptance of this limit by claiming a further contiguous zone for protective purposes, which in many ways seems to amount to an increased limit for territorial waters. At the same conference the six-mile limit which from the eighteenth century at latest has found favour in Spain, and has not been without support in France, obtained the adhesion of Spain, Italy, Brazil, Persia, Roumania, Turkey, and Yugoslavia. Norway adheres to its eighteenth century claim to a limit of a Scandinavian league of about four miles, and in this is still followed by Denmark and Sweden (*m*).

(*l*) See, however, the conclusions of Professor Gidel, *Droit International de la Mer*, Vol. III, Part, 3, Chapter 2, where an account of divergent views expressed at the Hague Codification Conference, 1930, will be found.

(*m*) Oppenheim, i. 385.

The Chilian Civil Code—as an example of a written constitution which has a proviso on the subject—enacts: “The contiguous sea to the distance of a marine league counting from the low water line is a territorial sea belonging to the national domain; but the right of police in all matters concerning the security of the country and the observance of the Customs laws, extends to the distance of four marine leagues counted in the same manner”.

Art. 1 of the British-American Liquor Treaty of January 23, 1924 (n), provides that:

The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

But by treaty it was agreed that for purposes of repressing liquor smuggling, visit and search of British ships when within one hour's sailing distance of the coast should be allowed.

(ii) GULFS, BAYS, AND INLAND SEAS

THE DIRECT UNITED STATES CABLE CO., LTD. v. THE ANGLO-AMERICAN TELEGRAPH CO., LTD.

46 L. J. P. C. 71; (1877), 2 App. Cas. 394.

THIS was an appeal from an order of the Supreme Court of Newfoundland, whereby the Direct Company (the appellants) had been put under an injunction prohibiting them from infringing certain exclusive rights granted to the Anglo-American Company (the respondents) or their predecessors in title, under an Act of the Newfoundland Legislature. It appeared that the appellants had brought and laid a telegraph cable to a buoy lying within Conception Bay on the east coast of Newfoundland. The buoy was laid more than three miles from the shore of the bay, but at the same time more than thirty miles within the bay. The bay is well marked; the distance between the two promontories at its entrance being rather more than twenty miles, and the distance between these promontories and the head of the bay being respectively forty and fifty miles, whilst the average width of the bay is about fifteen miles. In laying the cable care had been taken not to come, at any point, within three miles of the shore; and so no question arose similar to that which arose in

(n) L. N. T. S., vol. 27, p. 182.

The Queen v. Keyn. The question in the case was as to the territorial dominion over a bay of the configuration and dimensions above described. If, according to the true construction of the local Act, it was the intention of the Newfoundland Legislature to prohibit the use of "any part of its territory" by any other persons than the respondents for the purposes of telegraphic communication; and if the Newfoundland Legislature had been duly invested with such rights of legislation by the Imperial Parliament, then the respondents were entitled to a continuance of the injunction, subject always to the bay constituting a part of such territory. In the result the bay was held to be within British territory, and the appeal was dismissed.

Judgment.] The judgment of the Privy Council was delivered by Lord Blackburn. It was held that on the true construction of the Act in question it was the intention of the Newfoundland Legislature to prohibit the use of "any part of the territory" by any other persons than the respondents for the purposes of telegraphic communication, whether within the island or as a means of transit between places outside its territory. It was further held that, by 35 & 36 Vict. c. 45, the Imperial Parliament had conferred upon the Legislature of Newfoundland the right to legislate with regard to such territory. The only question, therefore, that remained was whether the bay could be regarded as part of the local territory. With respect to this, it was observed that the English common law authority on the subject was slender and vague. Sir Edward Coke and Sir Matthew Hale had both recognised the principle that branches of the sea "might" be regarded as within the body of the adjoining country, where a man may reasonably "discern" between shores. But this test was very indefinite; nor had the doctrine been applied to any particular place. In one case, however, *R. v. Cunningham* (Bell's Cr. C. 72), it had become necessary to determine whether a particular spot in the Bristol Channel, on which three foreigners on board a foreign ship had committed a crime, was within the county of Glamorgan, the indictment having charged the offence as having been committed within that county. In that case the Court for the Consideration of Crown Cases Reserved, after full discussion, had proceeded on the principle that the whole of that inland sea between the counties of Glamorgan and Somerset was to be considered as within the

counties by the shores of which its several parts were respectively bounded. The case also showed that usage, and the manner in which a branch of the sea had been treated in practice, were material in determining whether it was to be regarded as part of the adjoining territory or not.

Passing from the common law to the law of nations, Lord Blackburn observed that there was a universal agreement that harbours, estuaries, and land-locked bays belonged to the territory of the nation possessing the shores around them; but no agreement had been come to as to what constituted a "bay" for this purpose. Some writers had suggested defensibility from the shore as the test; some, a width of one cannon-shot from shore to shore, or three miles; some, a cannon-shot from each shore, or six miles; some, an arbitrary distance of ten miles. All these tests would exclude Conception Bay from the territory of Newfoundland; but equally would they have excluded from the territory of Great Britain that part of the Bristol Channel which in *R. v. Cunningham* was held by an English Court to be part of the county of Glamorgan. The text-writers did not, therefore, appear to agree; and the general question as to what configuration was necessary in order to constitute a bay a part of the adjoining territory did not appear ever to have been the subject of any judicial determination.

In the present case, however, it was not necessary to lay down any general rule, inasmuch as it appeared that the British Government had, in point of fact, long exercised dominion over this bay, and that the British claim had been acquiesced in by other nations, so as to show that the bay had for a long time been exclusively occupied by Great Britain. After referring to illustrations of this exercise of dominion and acquiescence, it was held that, in the view of a British tribunal, this was conclusive to show that the bay had become by prescription part of the exclusive territory of Great Britain.

It will be seen that the question whether the whole of Conception Bay was within the territory and jurisdiction of Newfoundland was considered both in the light of English law and of international law. The Privy Council, indeed, refused to make any pronouncement on the general question as to when a gulf or bay is to be considered a part of the territory of the adjacent State; but it did decide that, both under

the English law and by international law, the fact of a State having for a long period exercised dominion over such a body of water, and the fact of this claim having been acquiesced in by other nations, would serve to make it part of the national territory. The claim to exercise criminal jurisdiction within waters that lie *intra fauces terræ*, and the approval of this in *R. v. Cunningham*, have already been referred to. The British official practice appears also to be to claim and exercise administrative jurisdiction over "the waters of all bays the entrance to which is not more than six miles in width, and of which the entire land boundary lies within British territory"; and this even in relation to the subjects of foreign States. As a result of the conviction of the captain of the Norwegian fishing vessel for fishing in the prohibited area of the Moray Firth, it was provided by the Trawling in Prohibited Areas Protection Act, 1909 (9 Edw. 7, c. 8), that no prosecution should be brought for the exercise of prohibited fishing methods outside the three miles limit, the Firth being properly, as will be seen later, not regarded as a bay in any sense (o).

Sovereignty and Jurisdiction over Gulfs and Bays.—Gulfs and bays running into the territory of a single State are also commonly regarded as "territorial waters", and hence as subject to the sovereignty and jurisdiction of the territorial Power. It is universally admitted that this is so, if the width of a gulf or bay at its point of actual junction with the open sea does not exceed six miles. The North Sea Convention of 1882, already considered, extends this to ten miles. There are, however, territorial bays and gulfs whose entrance largely exceeds this limit. Thus, as we have seen, Conception Bay, with an entrance twenty miles wide, was held to be a part of British territory, and Hudson Bay, with an entrance of fifty miles, is also claimed as territorial water by Great Britain. So, too, the United States include in their "territorial waters" Chesapeake Bay, the entrance to which is twelve miles from headland to headland; Delaware Bay, which is eighteen miles wide; and Cape Cod Bay, which is thirty-two miles wide; as well as other inlets of a similar kind (p). France, for special reasons, claims the Bay of Cancale, the entrance to which is seventeen miles in width (q). Norway claims the Varanger Fiord, with an entrance of thirty-two miles, as territorial waters. Such claims would probably be admitted by other States, subject to the body of water in question exhibiting a well-marked configuration as a gulf or bay; and perhaps subject also to such claims being confirmed by prescription and acquiescence. But it would not extend to a long curvature of the coast with an open face; or to claims such as those formerly

(o) See *Mortensen v. Peters* (1906), 14 S. L. T. 227; 8 F. 93; 43 S. L. R. 872.

(p) See *The Alleganean*, Scott and Jaeger 297, and other cases there cited; and the case of *The Grange*, 1 Op. Att.-Gen. 32.

(q) Hall, 193 n.

made by the Crown in England as regards the "King's Chambers" (r), or to a claim such as that put forward by the United States in the Behring Sea controversy. So far as such bodies of water are rightly regarded as territorial, they will be subject alike to the sovereignty and jurisdiction of the territorial Power to the same extent and for the same purposes as those already indicated in the case of the littoral or marginal sea.

A Criterion for Territorial Bays.—Obviously if the three mile limit is to be strictly applied, any bay which measures more than six miles from headland to headland contains a piece of open sea, which from the point of view of fisheries is inconvenient and from that of neutrality intolerable. Hence the distance of ten miles from headland to headland fixed by the Convention of 1882. If we consider on the one hand bays which, though measuring more than six to ten miles across their entrance, are allowed nevertheless to be territorial waters, and, on the other hand, "bays" which are not so allowed, one is struck by the fact that the first are of the essence of bays while the second are rather firths, fjords or even roadsteads. A bay gives shelter, a roadstead not much, and the idea of sovereignty readily flows from its ability to give shelter to foreigners. Now in order to give shelter, a bay must be more or less bottlenecked, that is to say, it must have within it a span greater than the distance between the headlands. One speaks of the entrance to such a bay, but a roadstead, fjord or firth has none. Now if we apply the proposed test to the bays of international law, with regard to which there has been some controversy which has been settled, we shall find that those allowed to be territorial come within this definition—such are Conception Bay, Delaware Bay, Chesapeake Bay, Zuider Zee, Frische Haff, Kurische Haff, Chaleur Bay, Miramichi Bay, Cancale Bay, while on the other hand, a stretch of water such as the Moray Firth is not, nor is the Bay of Fundy (s). Nor is the Vestfjord, but Norway's claim to exclusive fishery rights in it has not been contested, for although on a precise definition of bays such a fjord is not territorial waters in the sense that a bottleneck bay is, nevertheless, this is merely a case of a nation claiming exclusive fishing in its approaches which, if the sea be *res nullius*, she can clearly do provided no one says her nay, such fjords, however, were not neutral waters during the First World War (t).

The case of *The Fagernes* (u) (which, however, was not a "controversy" but simply an application for service out of the jurisdiction and may perhaps fairly be regarded rather in the nature of an administrative decree than as a judicial decision) does not illustrate this criterion.

(r) These were portions of the sea comprised within lines drawn between promontories along the coast, see Taylor, 278

(s) *The Washington*, Scott, 294

(t) Trans. Grotius Soc. XV, 149

(u) *The Fagernes*, [1927] P. 311.

In *The Fagernes*, [1927] P. 311; 43 T. L. R. 746, a collision occurred in the Bristol Channel between a British steamship and an Italian steamship about the middle where the channel was admitted to be twenty miles wide. The Italian ship having sunk, the British plaintiffs' remedy was a writ *in personam* which they could only effectively serve by obtaining an order for service of notice of the writ out of the jurisdiction. Upon the Italian defendant's motion to set aside the order on the ground that the collision occurred outside British territorial waters, and therefore outside the jurisdiction of the Court, Hill, J., held "on common law alone" and following *R. v. Cunningham* (1869), Bell's C. C. 72, that the waters of the Bristol Channel at the place of the collision were *intra fauces terre* and within the body of the county of either Glamorgan or Devon (it mattered not which) and therefore within the jurisdiction of the High Court.

The Court of Appeal, on the other hand, took the view that questions affecting the Crown were involved and requested the attendance of the Attorney-General, who, in reply to a specific question put to him by the Court, said that he was instructed by the Secretary of State for Home Affairs to say that "the spot where this collision was alleged to have occurred is not within the limits to which the territorial sovereignty of His Majesty extends". Atkin and Lawrence, L.JJ., considered that the Court was bound by this statement of fact upon a matter peculiarly within the cognisance of the Crown, the question of what is the territory of the Crown being one of the matters of which the Court takes judicial notice. Bankes, L.J., would not go so far, but considered that the Court ought to be guided by the Attorney-General's statement. The Lord Justices thereupon unanimously held that the collision did not take place within the jurisdiction of the Court, and set aside the order for the service of the writ abroad.

The question whether sovereignty is exercised in any particular case with or without parliamentary or judicial control is a question of constitutional and not of international law. It has been pointed out that as the granting of leave to serve notice of writ outside the jurisdiction was discretionary, there was no clear issue in this case and it was open to the Court to decide differently another time. But whether the *dicta* in the case are therefore *obiter* or not, *semble* the Attorney-General's *ipse dixit* cannot abrogate the principle of security so categorically laid down in the preamble to the Territorial Waters Jurisdiction Act, 1878.

Inland Seas not directly communicating with the Ocean.—When an inland sea or lake—for the name matters little—possesses no navigable outlet, other than a river outlet, to the ocean, it will be deemed to form a part of the territory of the State within which it lies, and to be subject to its exclusive sovereignty and jurisdiction. Or, if the sea or lake is bounded by the territory of more than one State, then the line of demarcation will be drawn through the middle; although the whole water, if navigable, will be subject to a common right of

navigation on the part of all riparian States (a). But in such cases the respective rights of the riparian States are frequently regulated by convention. Again, in the case of Lakes Ontario, Huron, and Erie, which are really inland seas, lying within the borders of Canada and the United States, the maintenance by the riparian Powers of armed vessels within these waters is, by a convention of 1817 (b), restricted to certain small vessels, limited as to size and armament, which are required for police purposes (c). Such bodies of water, although they do not constitute a part of the high seas in the sense of the open waters of the ocean, are yet considered part of the high seas in the sense of being unenclosed waters which constitute a free highway for the people residing on their borders; and they have for this reason been held to be subject to the Admiralty jurisdiction (d).

Inland Seas directly communicating with the Ocean.—When a body of inland water, whatever its extent, and whether called a sea or bay or by any other name, communicates directly with the ocean, then the question of whether it falls within the category of "territorial waters" would seem to depend primarily on whether it is by its local configuration appurtenant to the land, and possibly also on whether it is bounded by the territory of more than one State. The former is probably the dominant consideration. With respect to the latter one can only say that the territorial claim would be greatly strengthened if the body of water in question were wholly enclosed within the borders of one State. As in the case of gulfs and bays, considerable weight would also probably attach to the question of long user and acquiescence.

(1) *The Baltic Sea*—But such a claim can never rightly be applied to the case of a sea which is for all practical purposes a continuation of the open sea, even though it may happen to be accessible through a comparatively narrow strait. For this reason the Baltic Sea, notwithstanding some occasional pretensions to that effect on the part of the Northern Powers (e), cannot rightly be considered as a closed or inland sea. And this appears to have been implicitly admitted as between the Powers that were parties to the Treaty of Copenhagen, 1857, and other treaties consequent thereon.

(2) *The Black Sea*—The Black Sea was formerly wholly enclosed by the territory of Turkey, and was for this reason regarded as subject to the dominion of the Ottoman Empire. Notwithstanding the subsequent acquisition of large portions of its coast by other States, such as Russia, Roumania, and Bulgaria, this sea has so far retained

(a) For a judicial recognition of these principles, see *U.S. v. Rodgers*, 150 U. S. 249; *Hudson, Cases*, p. 410.

(b) Ratified in 1818.

(c) See Taylor, 443.

(d) See *The Genesee Chief v. Fitzhugh*, 12 How. 443, as to prize jurisdiction, and *U. S. v. Rodgers*, 150 U. S. 249, as to criminal jurisdiction.

(e) Especially on the occasion of the First Armed Neutrality, 1780; see Westlake, 1. 196.

traces of its former character that "the ancient rule of the Ottoman Empire" that both the sea, and the straits giving access to it, should be regarded as closed to vessels of war, although open to merchant vessels since 1774, has been preserved by a variety of treaties made between Turkey and other European Powers (*f*). The most important of these is the Treaty of Paris, 1856, by which the Black Sea was neutralised, and declared open to the merchant vessels of all States, but interdicted to vessels of war, with the exception of certain light armed vessels required for the purposes of police under a convention between Russia and Turkey; whilst Russia also agreed to maintain no naval arsenals on the coast. By the Treaty of London, 1871, however, Russia was allowed to maintain war vessels on the Black Sea, and to establish naval arsenals on its coasts; although the principle of the closure of the Straits to vessels of war was still preserved, subject to a right on the part of the Sultan to open them in time of peace to the ships of war of friendly or allied Powers, in case this should be necessary in order to secure the observance of the subsisting provisions of the Treaty of Paris (*g*). Under the Treaty of Lausanne, 1923, the Straits Zone was to be demilitarised and supervised by an International Commission (Treaty Series No. 16 (1923), Cmd., 1929), but these arrangements did not endure. Under the Convention of Montreux, 1936, complete freedom of transit and navigation for all merchant ships both in time of peace and war was to be granted, save in the case of merchant ships of States at war with Turkey. With regard to war vessels special regulations were laid down both for time of peace and time of war as to passage of the Straits (*see infra*, p. 166). Russia in 1946 was pressing for a revision of this Convention.

(3) *Hudson Bay*.—The case of Hudson Bay is also peculiar. It is a vast body of water embracing an area of 580,000 square miles; and although the entrance is fifty miles in width, it lies wholly within the territory of Canada, and further exhibits a well-marked configuration as an inland sea or closed sea. The bay was originally discovered by Henry Hudson in 1610. In 1667 the Hudson Bay Company was formed; and in 1670 this company secured a royal charter granting to it the freehold of the bay and surrounding country, together with exclusive rights of trading, as well as the right of administration and of exercising a civil and criminal jurisdiction within the territory. These rights were temporarily invaded by the French, but were restored in 1713. The Treaty of 1818, which conferred on the inhabitants of the United States the liberty, in common with British subjects, "to take fish of every kind . . . on the coast of Labrador, to and through the Straits of Belle Isle, and thence northward indefinitely along the coast", was expressly stated to be "without prejudice" to any of the rights of the Hudson Bay Company. In 1870, in consequence of the dissatisfaction provoked by the company's rule amongst

(*f*) See Westlake, i. 194; Taylor, 120 *n*.

(*g*) Taylor, 124.

the inhabitants of the settled districts, its territory was purchased and taken over by the Canadian Government; the company, however, retaining the privilege of trading, as well as the ownership of certain areas and tracts reserved or granted to it. In this way the sovereignty of the territory, under the Crown, became vested in the Dominion of Canada; and in virtue thereof Canada now claims sovereign rights not only over Hudson Bay, but also over all the waters and lands to the west of the entrance to Hudson Strait. This claim rests on the original discovery of this region by British seamen; its occupation by the Hudson Bay Company; the recognition of the title of that company by France in 1713, and by the United States in 1818; finally, on the acquisition of the company's interest by Canada in 1870.

(iii) STRAITS AND NATURAL WATERWAYS

**CONTROVERSY BETWEEN DENMARK AND OTHER
POWERS WITH RESPECT TO THE SOUND DUES, 1857**

[Wharton, Digest, i. § 29; Phillimore, i. 254; Wheaton, § 183;
Moore Digest, i. § 134.]

FROM very early times Denmark had claimed both dominion and sovereignty over the waters of the Great Belt, the Little Belt, and the Sound, which connect the Kattegat and the Baltic, and divide Denmark from Sweden; the Sound being at one point only three miles wide. Denmark also claimed a right to levy toll on all vessels passing through these straits, this claim being founded in part on the ground that Denmark had originally owned both sides of the strait, and had, on the subsequent cession of the province of Scandia to Sweden, expressly reserved her rights in the matter; and in part on the ground that Denmark maintained buoys, lights and other necessary aids to navigation. This claim, which was sanctioned by prescription, and affirmed by numerous treaties made between Denmark and other maritime Powers, was for a long time acquiesced in by the other States; but in course of time both the collection of the dues and the detention and delay of the vessels which this occasioned became a source of complaint on the part of other States. And this discontent appears to have gained in strength with the increasing tendency, both in opinion and practice, to regard the

right of free passage through all waters constituting channels of communication between parts of the open sea as an inherent right under the law of nations. The United States, in particular, questioned the legality of these exactions, claiming that they constituted a violation of the now recognised principle of freedom of navigation; and alleging that if they were acquiesced in at the entrance to the Baltic, then they might well be demanded at the Straits of Gibraltar, or the Straits of Messina, or the Dardanelles. The issue was thus one between a prescriptive claim long acquiesced in, on the one hand, and the more recently established principle of free communication between parts of the open sea, on the other.

Settlement of the Controversy.] In the result this controversy as between Denmark and the chief maritime Powers of Europe, was settled by the Treaty of Copenhagen of 1857; whereby it was agreed—although without any explicit recognition of the right to levy such dues in the past—that Denmark should discontinue the levy of these tolls for the future; but should continue to maintain and renew all necessary buoys and light-houses; and should also superintend the pilotage of the straits, although without making pilotage compulsory, and at the same charges for foreign as for Danish vessels. A fixed rate of transit duties on goods was provided for. The other Powers, on their part, agreed, in consideration of this undertaking, to pay to Denmark an indemnity of thirty millions of rigs-dollars; such amount being assessed between the contracting parties in certain proportions (*h*). Similar conventions were subsequently made with other European Powers, such as Spain and Portugal, which had not been parties to the principal treaty. The Government of the United States refused to be a party to the principal treaty, both because this was thought to involve a recognition of Denmark's previous claim, and also because it did not care to involve itself in a question of purely European politics; but by a subsequent convention of 1858 it was arranged that the passage of the Sound and Belts should be made free also to American vessels, on the payment of a sum of £79,757, in consideration of Denmark undertaking to maintain the necessary adjuncts of navigation.

(*h*) £3,000,000, of which £1,125,206 was paid by Great Britain.

Freedom of innocent passage through waters otherwise territorial, such as straits connecting parts of the open sea, includes exemption from any toll or exaction on the part of the territorial Power. Hence even if Denmark had preserved her rights as riparian owner on both sides of the Sound, as she purported to have done, this, in itself, would not have warranted her in imposing tolls on, or in otherwise hindering, the passage of vessels belonging to other States. On the other hand, in such cases, prescriptive rights, and especially those which date back to a time prior to the formation of modern international law, cannot justly be ignored. And the controversy was therefore settled on lines which, whilst vindicating the dominant modern principle, yet made due provision for the satisfaction of claims sanctioned by long usage and acquiescence. The relinquishment of the Danish claim may be said to mark the final establishment of the principle of free navigation, as regards territorial waters constituting a necessary channel of communication between parts of the open sea.

Sovereignty and Jurisdiction over Straits.—In spite of some divergence of opinion, the principle governing the territoriality of straits appears to be the same as that which governs the littoral sea. Hence whether a strait is bounded on both sides by the territory of the same State, or is bounded on one side by the territory of one State and on the other by that of some other State or States, the adjacent Power or Powers, as the case may be, will be entitled, subject to the limitation mentioned hereafter, to treat as "territorial waters" and to exercise all consequent rights of sovereignty and jurisdiction over such parts of the strait as lie within three miles from the low-water mark.

Freedom of Innocent Passage.—But even though, on this principle, the whole strait should become a part of the territorial waters of the adjacent State, yet if it constitutes a natural waterway, or a necessary or convenient channel of communication between different parts of the high sea, it will, like the littoral sea, be subject to freedom of innocent passage on the part of vessels belonging to other States. This concession, whether in relation to the littoral sea or straits, would seem to extend to all vessels, public as well as private.

The Dardanelles and the Bosphorus.—These territorial straits, connecting the Black Sea and the Mediterranean, occupy a special position; and, owing to historical causes, are subject to special regulations, which form a part of the public law of Europe. By the Treaty of Paris and the Straits Convention of 1856, between Great Britain, France, Austria, Prussia, Russia, Sardinia, and Turkey, affirming certain earlier treaties to the same effect, it was provided that the navigation of these straits should be free to foreign merchantmen, but that foreign war vessels should be excluded, subject to certain minor exceptions. By the Treaty of London, 1871, however, it was declared

that the Porte should be at liberty to open these straits to the war vessels of friendly and allied Powers, for the purpose, if necessary, of enforcing the stipulations of the prior treaty. The action of Russia in 1904, during the Russo-Japanese War, in passing the "Smolensk" and "Peterburg" through the straits under the merchant flag, and subsequently employing them, under the names of the "Rion" and the "Dnieper", as armed cruisers, and in restraint of neutral trade, led to serious disputes between that country and Great Britain, on the ground (*inter alia*) that this was a violation of the Treaty of Paris and Straits Convention. The navigation of the straits, including the Dardanelles and the Sea of Marmora, is now governed by the Convention of Montreux, 1936 (i), replacing the arrangements of the Treaty of Lausanne, 1923. There is to be complete freedom of transit and navigation both in time of peace and of war for merchant ships of all nations; though Turkey may close the straits to merchant ships of States with which it is at war. As regards war vessels, in time of peace, non-Black Sea Powers have restrictions placed on the aggregate tonnage of their ships in the Black Sea at any one time, while Black Sea Powers can only send their capital ships through the straits singly, escorted by not more than two destroyers. Minor war vessels of certain specified categories are exempt from these provisions. In war time when Turkey is not a belligerent, passage of warships was only allowed either in pursuance of the Covenant of the League or of some other treaty of mutual assistance to the victim of aggression binding on Turkey. When Turkey was a belligerent, under the terms of the Convention she could close the straits, or even, subject to possible review by the Council of the League of Nations, if she considered herself in imminent danger of war. Questions were raised during the Second World War of the passage of alleged German landing craft through the straits—the matter turning on the actual nature of the ships concerned. These waters are to be "open both in peace and war, to every vessel of commerce or of war and to military and commercial aircraft without distinction of flag", and are to be subject to the control of an international commission, possessing its own flag, budget and organisation (i).

(iv) ARTIFICIAL WATERWAYS

THE S.S. "WIMBLEDON"

[1921 Permanent Court of International Justice, Series A, No. 1.]

ARTICLE 380 of the Peace Treaty of Versailles provided that the Kiel Canal and its approaches shall be maintained free and

(i) Cmd. 5249, Turkey, No. 1 (1936); A. J., 1937, Special Supplement, p. 1.

open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality. In 1920, in consequence of the state of war existing between Poland and the Russian Soviet Republics, the German Government issued neutrality regulations prohibiting the export or transit of arms, munitions and articles of war material to the territories of either belligerent. On March 21, 1921, the Director of Canal Traffic, basing his refusal on these orders, declined to permit the passage through the Kiel Canal of the British steamship "Wimbledon", chartered by the Société des Affréteurs Réunis, a French company, and carrying munitions to the Polish naval base at Danzig. Negotiations with the German Government having proved unsuccessful, the Governments of Britain, France, Italy and Japan brought the question before the Permanent Court of International Justice, as provided for by the terms of the Treaty of Versailles. The Polish Government also intervened. The application submitted that the German authorities were wrong in refusing free access to the Kiel Canal, and claimed that the German Government was therefore under an obligation to pay damages for losses sustained by the ship.

Judgment.] The Court held (Anzilotti and Huber, as well as the German Judge appointed, *ad hoc*, dissenting) that the s.s. "Wimbledon" should have been given free passage. The terms of article 380 were clear and free from doubt. Before 1919 the canal had been an internal and national waterway. It had become an international waterway intended to provide under treaty guarantee for easier access to the Baltic for the benefit of all nations of the world. Under its new regime, the Kiel Canal must be open on a footing of equality to all vessels, warships and vessels of commerce alike, provided only that they belonged to nations at peace with Germany. The treaty drew a clear distinction between the Kiel Canal, which is open to the war vessels and transit traffic of all nations at peace with Germany, and the other internal waterways of the German Empire, to which free access was only given to the Allied and Associated Powers. The Court did not think it necessary to decide whether the right over the Kiel Canal really amounted to a servitude, but held that in any event a limitation of sovereign rights of this kind must be construed restrictively. But the right could not be interpreted so restrictively that it conflicted

with the plain language of the article. The rules established for the Suez and Panama Canals, though not the same in both cases, demonstrated that the use of the great international waterways, whether by belligerent warships or ships carrying contraband, is not regarded as incompatible with the neutrality of the riparian Power; and in both cases such ships had been on various occasions allowed to pass through these waterways in time of war without molestation. It had never been alleged that from 1914 to 1917 the neutrality of the United States was compromised by such use of the Panama Canal. Even if the German orders were intended to apply to a transit of this kind, a neutrality order issued by an individual State could not prevail over the provisions of the treaty of peace. Germany was under no obligation to prohibit the passage of the "Wimbledon", but, on the contrary, was under a definite duty under the treaty to allow it. Held, therefore, that the refusal was wrong, and compensation assessed by the Court was due in respect of losses caused by the delay to the ship.

This case, the first judgment of the Permanent Court of International Justice, turned on the interpretation of the treaty provisions establishing the Kiel Canal as an international canal. Before the war of 1914 to 1919 the two chief examples of interoceanic canal, the Suez and Panama Canals, were both subject to a special regime, governed in the one case by a multilateral treaty, the Convention of Constantinople of 1888, and affected, in the other, by treaty arrangements between the United States and Britain (Hay-Pauncefote Treaty, 1901). The case of the Kiel Canal differed from these two cases in that it had originally been a purely national waterway, which was made subject to special international arrangements against the will of the Power through whose territory it passed, as the result of a treaty of peace (Arts. 380-386, Treaty of Versailles). The main provision with regard to its position was that discussed in the case of *The Wimbledon*. It was further provided that as regards charges, facilities, and in all other respects, there should be complete equality between the nationals of all powers, including Germany. No impediment was to be placed on the movement of persons or vessels, except for police, customs, or sanitary purposes, or emigration or immigration regulations, or regulations relating to the import or export of prohibited goods. All such regulations were to be reasonable, and uniform and not unnecessarily hindering to traffic. The canal charges were to be such

only as would cover the maintenance and improvement of the navigation. Germany was to be responsible for the maintenance of good conditions of navigation.

Artificial Waterways.—Artificial waterways, on the other hand, are not subject to those rules which govern the use of straits or natural waterways, and no right of "innocent passage" exists with regard to them. Except where regulated by international convention, as in the case of the Suez, Panama, and Kiel Canals, such waterways are subject to the exclusive control of the State within whose territory they lie, and that State may either prohibit or regulate their use by vessels belonging to other States, as it may deem expedient. Such is the case with the Corinth Canal, which connects the Gulf of Corinth with the Gulf of Ægina. Nevertheless, in the case of certain inter-oceanic canals, the importance of the waterway as a part of the highway of nations has led to their regulation by international convention, and such agreements, although they are liable to modification and do not yet embrace all civilised States, may nevertheless be said to rank with those great "international settlements" already described. Such is the case with the Suez, Panama, and Kiel Canals.

Interoceanic Canals; (1) *The Suez Canal*—The Suez Canal was originally constructed by a French company under a concession from the Khedive of Egypt; and was opened for traffic in 1869. In 1875 the British Government purchased the Khedive's shares, and both the British Government and British shipping interests are now represented on the governing body. The canal thus occupies a peculiar position. It is an artificial waterway; it lies wholly within Egyptian territory, it is owned by a French company, the British Government being, however, the largest shareholder, and the largest proportion of the vessels using it being British, whilst, finally, it constitutes an international waterway of vital importance to the commerce of the world. In 1882, in the course of the British operations in Egypt, the canal was occupied by Great Britain, and traffic for a short time suspended. In 1885 the principal European Powers agreed to appoint a commission for the purpose of drawing up a convention for the establishment of the free navigation of the canal. The commission was appointed and drew up a scheme, but it was only after protracted negotiations that an agreement was arrived at. Ultimately, a convention, which is commonly known as the Suez Canal Convention, was made between Great Britain, France, Germany, Austria, Italy, Spain, the Netherlands, Russia, and Turkey, and ratified at Constantinople in December, 1888. The rules which it embodies are in substance as follows: (1) The canal is to be open to all vessels at all times, whether of peace or war, and is never to be blockaded. (2) No permanent fortifications are to be erected in the canal. (3) No acts of hostility are permitted within the limits of the canal or its ports of access, or within three miles therefrom. (4) War vessels belonging to a belligerent shall not be at liberty whilst using the canal to embark or

disembark troops (*k*), or to revictual or take in stores, or to stay in the canal or its ports of access for more than twenty-four hours, save in case of necessity or as thereafter provided, and the same provisions are to apply to their prizes. (5) In case vessels belonging to different belligerents find themselves in the canal or ports of access at the same time, then twenty-four hours shall elapse between the departure of any vessel belonging to one belligerent and that of any vessel belonging to the other. (6) No men-o'-war shall be stationed inside the canal, although each Power, not being a belligerent, may station two men-o'-war in the ports of Suez or Port Said. The Egyptian Government was charged with taking the necessary steps to carry out these provisions; appealing to Turkey, and through Turkey to the signatory Powers, in case of need. The territorial rights of Turkey are expressly reserved by the convention, as are also the sovereign rights both of the Sultan and Khedive, except in so far as they are expressly affected by the terms of the agreement (*l*). On December 18, 1914, a British Protectorate was proclaimed over Egypt, and by Art. 152 of the Treaty of Peace, 1919, the rights of the Sultan under the Convention of 1888 were transferred to Great Britain, and by the Treaty of Lausanne, 1923, Turkey renounced her rights over Egypt. Egypt became fully independent in 1922, but the question of the defence of the canal was reserved for negotiation between the British and Egyptian Governments. Special provisions on this subject are embodied in the Treaty of Alliance between Great Britain and Egypt of August, 1936, which will doubtless be reviewed in negotiations now pending (1946) for the modification of that treaty.

(ii) *The Panama Canal*.—In 1880 M. de Lesseps, having obtained the necessary concessions, formed a company for the purpose of constructing a ship canal through the isthmus of Panama, between the Atlantic and Pacific Oceans. The canal was commenced in 1881, and its construction proceeded with for some time, but in consequence of the insolvency of the company its operations were suspended in 1889, and subsequently abandoned. In 1890 an extension of time was granted by the Government of Colombia to the liquidators of the Panama Canal Company, with a view to the reconstitution of that company and the renewal of the work; but without any practical result. Meanwhile, amongst other projects, one was formed for the construction of the canal by the United States Government; and in 1903, after much negotiation, that Government undertook to purchase all the rights and property of the Panama Canal Company for an agreed sum, subject to the conclusion of a treaty with the United Republic of Colombia for the acquisition of the necessary concessions. Such a treaty was provisionally concluded in 1903, and was in fact ratified by the United

(*k*) It was subsequently agreed, however, that this provision should not apply to the landing of invalids at the hospitals of Suez and Port Said.

(*l*) As to certain reservations made by Great Britain on the signing of this convention, in relation to its effect on the British occupation; and as to the effect on these of the Anglo-French agreement of 1904, see Westlake, i. 328.

States Senate, although it failed to secure the approval of the Congress of the United Republic. On November 3, 1903, however, Panama, one of the member States of the United Republic, seceded and declared its independence. The United States thereupon intervened, nominally for the purpose of protecting the railway; and thereafter, despite the protests of the Colombian Government, refused to allow the troops of the latter Power to land. On November 6 the revolutionary Government of Panama was recognised by the United States as a *de facto* Government; and on November 18 a new canal treaty on the lines of that previously proposed to the United Republic, but enlarging somewhat the jurisdiction conceded to the United States, was provisionally concluded. After the adoption of a constitution by the new State, this treaty was duly ratified on its behalf; and was also ratified by the United States Senate.

(a) *Treaty between the United States and Panama (m).*—Briefly, the purport of the new canal treaty, known as the Hay-Varilla Treaty, was as follows. (1) Panama ceded to the United States a strip of territory, five miles in width, on each side of the proposed canal, and also such other land as might be necessary to the construction and maintenance of the canal, together with the sovereignty over all such lands, and maritime jurisdiction over a space of three marine miles from each end of the canal. (2) The concession also carried a right to fortify and police the terminal towns of Colon and Panama, subject to their municipal autonomy not being interfered with, so long as order was preserved. (3) Panama also granted to the United States the use of all navigable waters outside the canal zone, so far as might be necessary or convenient for the construction, maintenance, or sanitation of the canal, as well as a perpetual monopoly of any existing system of communication across the isthmus of Panama. (4) In consideration of this concession the United States undertook to guarantee the independence of the State of Panama; and also to pay \$10,000,000 in cash, as well as an annuity of \$250,000, commencing nine years after the ratification of the treaty. Subsequently Congress also passed an Act making due provision for the government of the canal zone.

(b) *Treaty between Great Britain and the United States, 1901.*—Meanwhile another obstacle to the construction and control of the proposed canal by the United States had arisen under the provisions of the Clayton-Bulwer Treaty of 1850. By this treaty, which had been entered into between Great Britain and the United States in anticipation of the construction of a ship canal through the same isthmus, it had been agreed, *inter alia*, that neither Power should "exercise any exclusive control over such ship canal", or "erect or maintain any fortifications commanding the same" (n). After much negotiation, however, the provisions of this treaty were eventually superseded by a

(m) Brit. and For. State Papers, vol. 96, p. 553. Ratifications exchanged at Washington, February 26, 1904.

(n) For an account of the controversy which arose in connection with this treaty, see Lawrence, *Essays on International Law*, No. 3.

new treaty of November 18, 1901, known as the Hay-Pauncefote Treaty, which was subsequently duly ratified by both parties. By this treaty it was agreed that the canal should be constructed under the auspices of the Government of the United States; that that Government should also have the exclusive right of regulating and managing the canal (Art. 2.); but that the canal should be neutralised, the rules adopted as the basis for its neutralisation (a) being very similar to those embodied in the Suez Canal Convention of 1888. The rules by which the navigation of the canal, when constructed, was to be governed are, in substance, as follows: (1) The canal is to be free and open to the vessels of commerce and of war of all nations on equal terms, and on just and equitable conditions. (2) The canal shall never be blockaded, or hostilities committed therein, although it is to remain subject to the necessary police powers on the part of the United States. (3) Belligerent war vessels shall not be allowed, whilst using the canal, to take in supplies (except in case of necessity) or munitions of war, or to embark or disembark troops, and shall be required to pass through the canal with the least possible delay in accordance with the regulations in force, the same provisions being applicable to prizes. (4) These provisions are also to apply to waters adjacent to the canal within three miles of either end. (5) Belligerent war vessels shall not tarry in such waters beyond twenty-four hours (except in case of distress), but a war vessel belonging to one belligerent shall not depart within twenty-four hours of the departure of a war vessel belonging to another. (6) All works and buildings connected with the canal are to enjoy complete immunity from attack in time of war (Art. 4, sub-ss. 1-6). It is also stipulated that no change of territorial sovereignty or in the international relation of the countries traversed by the canal shall affect its neutralisation or the obligations of the parties under the treaty (Art. 4). The Panama Canal was opened in 1914, regulations concerning its use being issued by the United States.

(iii) *The Kiel Canal*.—The Kiel Canal, which connects the Baltic with the North Sea, was originally a German canal constructed mainly for strategic purposes. By Articles 380-86 of the Treaty of Versailles, 1919, the Kiel Canal and its approaches are to be "free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality". Charges may be levied only for maintenance, improvement or expenses incurred in the interests of navigation. Germany is made responsible for any obstacle or danger to navigation and for the maintenance of good navigable conditions. She is not to undertake any works of a nature to impede them. In case of violation, or disputes as to the interpretation, of these Articles, any party may appeal to the League of Nations, and for the settlement of small questions a local authority is to be set up at Kiel by Germany.

(a) As to the applicability of this term, see Westlake, i. 330 n.

*RIGHTS OF FISHERY***BRITISH-AMERICAN FISHERIES DISPUTES, 1815—1910**

[British and Foreign State Papers, vol. 6 (1818-19); vol. 79 (1887-88); vol. 83 (1890-91); Parl. Papers, U. S., No. 1, 1906; Parl. Papers, Newfoundland, 1907 (p); and Scott, *Hague Court Reports*, p. 146.]

By the treaty of 1783, which recognised the independence of the United States, Great Britain conceded to the inhabitants of the former country a right to take fish of every kind on the Grand Bank and other banks of Newfoundland; and also on the coasts of Newfoundland, in the Gulf of St. Lawrence, and on the coasts, bays and creeks of other British possessions in North America; together with a right to land for the purpose of drying their nets and curing fish in the unsettled bays, harbours and creeks of Nova Scotia, the Magdalen Islands and Labrador, so long as the same should remain unsettled.

Effect of the War of 1812.] After the war of 1812 a dispute arose as to whether the privileges conceded by the treaty of 1783 had been abrogated by the war. On the part of the United States, it was contended that the effect of that treaty had been, not to confer any new rights or privileges, but only to confirm and regulate those rights which had been enjoyed by inhabitants of the United States before the separation of the two countries; and that such rights were in the nature of real rights, and consequently not affected by the subsequent outbreak of war, any more than the recognition of independence itself. On the part of Great Britain it was contended that the claim of one State to occupy any part of the territory or fish in the territorial waters of another State could not rest on any other foundation than convention. Nor could she assent to the proposition that such a treaty could not be abrogated by subsequent war; or that the present case constituted any exception to the general effect of war on treaties, more especially in view of the fact that the rights conferred by the treaty had in themselves all the features of temporary concessions. Nor did it follow, even if some stipulations of a treaty were irrevocable, that the whole of its provisions were so.

(p) See also "The Newfoundland Fishery Dispute", by P. T. McGrath, *N. A. Review*, vol. 183, p. 1134; and "The Fishery Concessions to the United States in Canada and Newfoundland", by the Hon. T. Hodgins, *Contemporary Review*, June, 1907.

Treaty of 1818.] After much correspondence between the two Governments, the orders given to the British commissioners to prohibit the exercise of such rights by inhabitants of the United States were suspended, with a view to the arrangement of a new treaty. As the result of these negotiations a new treaty was entered into in 1818 between the two countries, whereby perpetual fishing rights were conceded to the United States on the basis of contract (*q*). More particularly it was provided: (1) that the inhabitants of the United States should have, for ever, in common with British subjects, the liberty to take fish of every kind on that part of the southern coast of Newfoundland which extends from Cape Ray to the Ramea Islands; and on the western and northern coasts from Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbours and creeks from Mount Joli, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northward indefinitely along the coast; but without prejudice to any of the exclusive rights of the Hudson Bay Company; (2) that the United States fishermen should also have for ever liberty to land for the purpose of drying and curing fish, in any of the unsettled bays, harbours and creeks of the southern part of the coast of Newfoundland above described, and of the coast of Labrador, but not after the same were settled, except by previous agreement with the inhabitants, proprietors and possessors of the ground; whilst (3) the United States renounced for ever the right to take, dry or cure fish on or within three marine miles of any of the coasts, bays, creeks or harbours of the British dominions in America not included within the above limits; although they were to be allowed to enter for shelter, repairs, purchasing wood and obtaining water, but not for any other purpose, and subject in any case to such restrictions as might be necessary to prevent them from exceeding or abusing this privilege. In 1819, by 59 Geo. 3, c. 38, the Crown was empowered by Order in Council to issue such regulations and directions as might be deemed necessary for carrying this convention into effect, notwithstanding any Act, law, custom or usage to the contrary.

Subsequent Treaties and their Rescission.] In 1849, at the

(*q*) See Hall, 117.

instance of Canada, negotiations were commenced between Great Britain and the United States, with a view to conceding to the inhabitants of the United States further rights of fishery, in return for reciprocity of trade with Canada in all natural productions. In the result, by the reciprocity treaty of 1854, the whole matter was readjusted on the basis of a mutual concession of certain rights of fishery, without restriction as to distance from the shore—to the inhabitants of the United States, along the coasts of Canada, Nova Scotia, New Brunswick, Prince Edward Island, and adjacent islands—and to British subjects, along the eastern coasts of the United States north of 36° N. lat.; certain kinds of fishery, such as salmon and river fishery, being, however, in both cases expressly excepted. This treaty, which was terminable, was brought to an end by the action of the United States in 1866, with the result that the parties were thrown back on the treaty of 1818. The matter was for a time regulated anew by the Treaty of Washington, 1871, by which reciprocal rights of fishing were conceded very much on the lines of, and within the limits prescribed by, the previous treaty of 1854; save for the substitution, as regards the privileges of British fishermen, of 39° for 36° N. lat. Inasmuch as the privileges conceded to the United States were alleged to be greater than those conceded to Great Britain, provision was made for the appointment of a Commission to inquire into this matter and to settle the amount of compensation, if any, which might be due in respect of this alleged want of mutuality of consideration; with the result that a Commission sitting at Halifax in 1877 awarded to Great Britain a sum of \$5,500,000. The Treaty of Washington, which was also made terminable at any time after ten years, subject to two years' previous notice by either party, was brought to an end by the United States in 1885; with the result that both parties were again relegated to their rights under the treaty of 1818. The strict enforcement of the provisions of this treaty by the Canadian Government gave rise to much friction; and with a view to abating this, and as the result of a conference held at Washington in 1887, the terms of a new treaty were provisionally agreed upon. By this it was provided, *inter alia*, that a mixed Commission should be appointed for the purpose of ascertaining and determining those waters of Canada and Newfoundland over which the United

States Government had renounced any claim; whilst it was also agreed that the marine league, within which exclusive rights of fishery usually belong to the territorial Power, should be measured from low-water mark, or, in the case of bays and gulfs not more than ten miles across, by a straight line drawn from headland to headland. This treaty, however, fell through, owing to the refusal of the United States Senate to ratify it. Another treaty, known as the Chamberlain-Bayard Treaty, was provisionally entered into in 1888, but failed to secure the ratification of the United States Senate.

Controversy between United States and Newfoundland.] Meanwhile, difficulties and disputes had arisen between Newfoundland, which had been endowed with responsible Government in 1855, and the United States, with respect to the exercise in Newfoundland waters of the fishing rights conceded to American fishermen by the treaty of 1818, and especially as to how far the latter were bound by regulations affecting the local fishermen; and in these disputes Great Britain now found herself involved. A settlement was provisionally arranged by a treaty made in 1890, known as the Bond-Blaine Convention; but the final ratification of this convention was withheld by Great Britain at the instance of Canada. In 1893 a Foreign Fishing Vessels Act was passed by the Newfoundland Legislature, which prohibited such vessels from purchasing bait or other supplies on or within the three-mile limit, except on the issue of a licence and on payment of a prescribed charge; from engaging men in any port or part of the coast; and from entering such waters for any purpose not authorised by convention or statute, under penalty of seizure and confiscation. In 1902, as the result of fresh negotiations between Newfoundland and the United States, the terms of a treaty known as the Bond-Hay Treaty were provisionally agreed upon; but this treaty was virtually rejected by the United States Senate. Thereupon the Newfoundland Legislature in 1905 passed a new Foreign Fishing Vessels Act, in which the provisions of the former Act were repeated, with the omission of the sections authorising the issue of licences. Finding that this was evaded by the United States fishermen, who engaged local crews just outside the three-mile limit, a new Act, the Foreign Fishing Vessels Act, 1906, was passed, prohibiting local fishermen from leaving the territory for the purpose of serving

on foreign vessels, and also prohibiting the latter, under penalty of fine and confiscation, from employing local fishermen, being British subjects, for the purposes of their fishery in colonial waters; although this Act was only to come into operation upon proclamation that it had been approved and confirmed by the Crown in council. Upon the protest of the United States against this legislation, the British Government intervened; and in October, 1906, a *modus vivendi* was arranged between the British and American Governments, under which, for the ensuing season, the American fishermen were allowed to engage local fishermen outside the three-mile limit, and also to use purse seines (a practice forbidden by the local regulations) in local waters; but were required to pay light dues, to abstain from fishing on Sundays, and to report at Customs-houses when possible; the British Government undertaking to suspend the Act of 1906, and to limit the operation of the Act of 1905, in accordance with these arrangements.

In June, 1907, in view of the approach of the fishing season, negotiations were renewed, with the result that in July the United States proposed "a reference of pending questions under the treaty of 1818 to arbitration before The Hague Tribunal", and an *ad interim* renewal of the existing *modus vivendi*. The former proposal was found to be acceptable both to Newfoundland and to Canada, which were consulted by Great Britain during the course of the negotiations; but the proposed renewal of the *modus vivendi* was objected to by Newfoundland as unjustifiable and unnecessary, and any modification of the domestic law by local authority was refused. Notwithstanding this objection, the United States proposals were ultimately accepted by Great Britain, subject only, as regards the *modus vivendi*, to an abrogation of the right of the United States fishermen to use purse seines. In order to give effect to this arrangement, and with the object of displacing the local laws in so far as they might be inconsistent therewith, an Order in Council was issued on September 9, 1907, under the authority of 59 Geo. 3, c. 38. This Order directed that none of the local provisions, relating to the boarding and bringing into port of foreign fishing vessels offending against the local law, should apply to vessels used by the inhabitants of the United States in pursuance of any rights conferred by the treaty of 1818; and

also forbade the arrest or seizure of such vessels, save with the consent of the senior naval officer on the Newfoundland station. Newfoundland protested against the proceeding; but the Order in Council was nevertheless proclaimed in Newfoundland on September 24, 1907. In August, 1908, however, another *modus vivendi* was concluded, and this having been accepted by Newfoundland, the Order in Council was revoked. In February, 1909, the terms of reference of the dispute to The Hague Tribunal were agreed, and the dispute settled by the award of the Permanent Court of Arbitration in 1910, which refused to recognise servitudes in this connection (r). The recommendations contained in the award were with certain modifications embodied in a treaty signed July 20, 1912.

This controversy, although settled, serves, in the various phases through which it has passed, to illustrate several important principles. (1) In the first place, the British contention, that the claim of one State to occupy or use any part of the territory or to fish in the territorial waters of another cannot rest on any other foundation than conventional stipulation, may be said to have been affirmed—and the American contention, that on the separation of one State from another State the inhabitants of the former retain all local rights previously enjoyed in the territory of the latter, may be said to have been refuted—by the arrangement of 1818, under which such rights were accepted by the United States on the basis of contract (s). (2) The terms of the proposed arrangement of 1887 also convey a useful indication as to the limits of the marginal sea within which a State may be said to possess exclusive fishing rights, and their mode of ascertainment. (3) The contention of the United States, that where a right, in the nature of a right of fishery, has once been conceded by treaty by one State to another, such a right, even though suspended by a subsequent outbreak of war, will nevertheless revive without express stipulation on the restoration of peace, would appear to depend for its validity on whether the treaty in question was intended to set up a permanent state of things or not (t). (4) The question as to how far a State whose subjects are invested by treaty with rights of fishery within the territorial waters of another State is bound by the municipal regulations of the latter is still unsettled. As to this the British Government contended that such a right was not a right to a free, but only to a regulated fishery; to be exercised “in common with” subjects of the territorial Power, and

(r) Scott's Hague Court Reports, 159–160.

(s) See Hall, 118, note 2.

(t) See vol. II, “Effect of War on Treaties.”

subject to the like regulations (u) The contention that a State, in such a case, is only bound by regulations existing at the time of the treaty appears to be altogether untenable, for the reason that conditions suitable at one time may become inadequate or wholly unsuitable at another In the same way, a claim to veto the making of new regulations would appear to be altogether inconsistent with the true nature of the concession; which was essentially a grant of the right to share in privileges primarily belonging to the subjects of the territorial Power, and not a surrender of the entire interest of the grantor, involving *pro tanto* an abrogation of sovereignty It is, moreover, an accepted rule that a treaty should be construed, so far as possible, in such a way as to give due effect to the fundamental legal rights of a State, including the right of regulating all matters occurring on its own territory or territorial waters, except where this right has been expressly resigned For these reasons, it would seem that the territorial Power in such a case must be deemed to retain its power of making all reasonable and suitable regulations, and that both the grantee State and its subjects will be bound thereby But in order that such regulations may be "reasonable" they must have been made in the interest of the proper working of the fishery, and not for the purpose of putting the grantee State or its subjects at a disadvantage, or limiting the actual enjoyment of the rights conferred by the Treaty (a) The Arbitral Tribunal, therefore, held that Great Britain had the right to regulate the fishery without the consent of the United States, provided that the regulations were made *bona fide* and not in violation of the treaty Regulations appropriate or necessary for the protection and preservation of such a fishery, or desirable on the grounds of public order or morals without unnecessarily interfering with the fishery, and fair and equitable as between local and American fishermen, not giving an unfair advantage to the local fishermen would not be a violation of the Treaty (5) Finally, there is the question as to the position of one State, where its rights, whether arising under treaty or not, are prejudiced or infringed by the action of a constituent part or dependency of another State, acting within its powers under the local constitution A general answer to this question will be attempted hereafter But in the particular controversy now under consideration it would seem that the United States Government had by its previous action, in connection with the treaties of 1854, 1874, and possibly even by the unratified compacts of 1874 and 1887, in which it assented to provisions that could only be carried into effect by the intervention of the Colonial Legislature, committed itself to an acknowledgment of the authority of the Colonial Legislature, in a way that precluded it from subsequently questioning the competency

(u) Sir E Grey to Mr Whitelaw Reid, February 2, 1906 A similar position appears to have been taken up by Mr Evarts in connection with the Fortune Bay disturbances of 1878; see Hodgins, *Contemporary Review*, June, 1907.

(a) See also Hall, p 394

of Newfoundland to intervene, even though it might question the validity of its regulations on other grounds (*b*)

The Right of Fishing in Territorial Waters.—Every State has an exclusive right to the enjoyment of the fisheries, and the appropriation of other products of the sea, within the limits of its "territorial waters", and such rights are in fact commonly reserved to the subjects of the territorial Power. On principle it would seem to extend to all waters that are in fact regarded as "territorial", whether they fall within the common rule, or are so treated by virtue of prescription and acquiescence. Nevertheless, rights of fishery within these limits are occasionally conceded to the inhabitants of other States; the right in such cases being sometimes concurrent and sometimes exclusive. Thus, concurrent rights of fishery within certain limits were, as we have seen, mutually conceded as between Great Britain and the United States, under the treaty of 1854. Again, in 1713 a concession of exclusive rights, although seemingly only as regards certain kinds of fishery, was made by Great Britain to France, in the waters adjacent to certain parts of the coasts of Newfoundland.

The Principle of Reciprocity and of Indifference in regard to Fisheries (*c*).—The ideal international arrangement is one in which all the nations are interested, *e.g.*, the Universal Postal Union. All the nations are not interested in fisheries, nor equally, whence flows the principle of *indifference*, which may be seen where there is no reciprocity and no conflict. In 1909, the French Government applied to Spain asking that instructions should be altered so as to allow fishing from French boats in the waters between the three-mile limit and the six-mile limit. Spain, however, refused. Considerations of geography suggest that in this case France was probably sufficiently indifferent not to pursue her request. Spain and Portugal, however, have—and this on geographical grounds alone is to be expected—a mutual arrangement to respect the other's six-mile limit. And with regard to Norway we have a similar state of affairs. It will have been remarked that, while Denmark is a signatory to the North Sea Fishery Convention of 1882, Norway would not come in, for she insists on her four-mile limit and also prevents foreigners fishing over very large areas in her fjords. Now Norwegians may fish up to our three-mile limit—an illustration of the principle of indifference. Our fishing grounds and those of Norway are not so situated with regard to one another as to make the matter in any sense an urgent one. It is only fair to say that Norway does not, however, insist on her four-mile limit out of pure stubbornness; it merely unfortunately happens that one Norwegian league is equal to four of our miles, so that the rule originally was the simplest possible, being a unit, which may also be the origin of our limit of one league. It is important to distinguish between agreement and right. There must be consideration in an agreement; we

(*b*) See Hodgins, *loc. cit.*

(*c*) L. Q. R., July, 1926.

have so to speak nothing to offer Norway. How came the United States, for instance, to have a three-mile fishery limit? By reason of reciprocal interest with a Power (Great Britain) part of whose dominions were alongside. The position with regard to Denmark is curious, and illustrates in a striking manner the foregoing principles. Denmark may, of course, as may anyone else (for we appear to be indifferent) fish up to within three miles of our coast, and we may fish up to within three miles of hers, but Norwegians are excluded from another mile of the Danish coast and *vice versa*.

Lastly, the fact that nations tend to fix their own territorial limits (or not to fix them as the case may be) and seem to be disinclined to enter into an international arrangement (except with certain nations for certain purposes) seems to show that they conceive themselves as taking their territorial waters and approaches from the *res nullius* of the high seas and, so to speak, resent the implication that these waters are granted to them by the nations, as they would be if the high seas were *res communis*.

The Newfoundland Fishery Dispute between Great Britain and France — By the Treaty of Utrecht, 1713, by which the British sovereignty over Newfoundland was finally recognised by France, liberty was reserved to the French to catch fish, and also to land for the purpose of drying and curing fish along the coasts of Newfoundland, between certain points indicated by the Treaty, this concession having been confirmed by the Treaty of Paris 1763 whilst the territorial limits were somewhat modified by the subsequent Treaty of Versailles of 1763. By a declaration, moreover, accompanying the latter Treaty, the British Government undertook to prevent its subjects from interfering by their competition the fishery rights so conceded and also to cause any fixed settlements which had been or might be formed within the French limits, known as the "French shore", to be removed. After the concession of responsible government to Newfoundland in 1855 various disputes arose more especially as to whether the concession applied to all kinds of fishery, including the lobster fishery or only to the cod fishery, also as to whether the undertaking accompanying the Treaty of 1763 extended to the prohibition of all settlement and industries within the prescribed limits or only to such as were reasonably calculated to interfere with the fishery rights granted to the French and, finally, as to whether the French rights of fishery extended to the waters of the rivers and lakes. After much negotiation, a *modus vivendi* between Great Britain and France was arrived at in 1890.

Ultimately, by the Anglo-French Convention of 1904 (d) France renounced the exclusive rights conceded by the Treaty of Utrecht and subsequent treaties; but retained the right of fishing on a footing of equality with British subjects in the territorial waters (e) of Newfoundland passing by the north between Cape St John and Cape Ray, during the ordinary fishing season, with a right to enter any port or harbour, and to obtain supplies on the same conditions as the inhabitants of Newfoundland, subject to the local regulations. In consideration of this Great Britain agreed to pay an indemnity in respect of any

(d) Confirmed so far as relates to British subjects by the Anglo-French Convention Act, 1904.

(e) Other than the mouths of rivers, beyond a straight line drawn between the extremities of the two banks.

loss thereby occasioned to French fishermen, the amount of such indemnity to be determined by arbitration

The Right of Fishing on the High Seas.—The right of fishing on the high seas is open to all, each State having jurisdiction only over its own subjects and own vessels. Nevertheless, in the common interest, provision is sometimes made by international convention for the mutual enforcement of certain restrictions and police regulations, in the case of fishing grounds frequented by fishermen of various nationalities. So, by the North Sea Fisheries Convention of 1882 and 1889, the Powers abutting on the North Sea adopted a variety of regulations designed to secure the maintenance of peace and order amongst vessels engaged in fishing in the North Sea outside territorial waters, whilst by the conventions of 1887, 1893 and 1894 the sale of spirituous liquors is also prohibited (*f*). Moreover, by municipal law, the engagement by the subjects of one State in fisheries outside the territorial limits is sometimes subjected to certain restrictions. Thus, as has already been pointed out, the award of the arbitrators in the Behring Sea controversy of 1893 imposed on the parties the duty of enforcing certain restrictions and regulations on their subjects and citizens, as regards the seal fisheries in the Behring Sea, an obligation which was, so far as British subjects are concerned, given effect to by the Behring Sea Award Act, 1894, and the Seal Fisheries (North Pacific) Act, 1895. It proved desirable to replace and supplement the regulations by a Convention for the Preservation and Protection of Fur Seals, 1911, given effect to by Great Britain by the Seal Fisheries (North Pacific) Act, 1912. At the same time, it would seem that the claim to exercise jurisdiction and control even over foreigners, in relation to fisheries outside territorial limits, has been not wholly abandoned. The provisions in this respect of the Commonwealth of Australia Constitution Act, s 51, sub s 10, have already been noticed. A similar extra-territorial jurisdiction has been asserted also with respect to the pearl fisheries of Ceylon and in the Persian Gulf (*g*). But, in general and except where sanctioned by convention and in relation to the subjects of the signatory Powers, it would seem doubtful whether any such jurisdiction can validly be claimed or exercised, even by prescription. Special interests in such cases must be deemed to be subordinate to that larger interest which is involved in the preservation of the freedom of the sea, and the common right to its products.

(*f*) As to British municipal legislation on this subject, see the Sea Fisheries Acts of 1868 and 1883. See also Articles 273 and 285 of the Peace Treaty, 1919. A Convention of 1901 between Denmark and Great Britain as regards fisheries off the Faroe Islands and Iceland closely follows the provisions of the North Sea Fisheries Convention, 1882, Oppenheim, *l* 496. In 1931 a Regulation of Whaling Convention was signed by a number of States providing general regulations for the whale fisheries, A J, 1936, Supp., p 167, Treaty Series No 33 (1934), Cmd 4751. This was ratified by Great Britain in 1934. See Whaling Industry (Regulation) Act, 1934, and S R O No 961 (1934) and the agreement signed June 8, 1937. Cmd 5487 (1937).

(*g*) But see Westlake, *l* 186.

*EXTRA-TERRITORIAL ACTION—SELF-PROTECTION***THE CASE OF THE "CAROLINE"**

[1843: Parl. Papers, vol lxi; Wharton, Digest, i. § 50; Moore, Digest, ii. §§ 179 and 217.]

IN 1838, during the Fenian raids on Canada, a body of insurgents, having armed and organised in American territory, and having occupied a small island on the American side of the Niagara river, proceeded to make preparations for a descent on British territory, by means of a small steamer called the "Caroline". Thereupon the officer in command of the British forces determined to attack the "Caroline". It was expected that the vessel would be found moored in British territory, near Navy Island, in the Niagara river; but after the expedition had started it was found that she had altered her usual moorings and had shifted to the United States side of the river. Notwithstanding this, the attack was made; with the result that the vessel was boarded, and after a short resistance sent down the Niagara Falls.

The United States Government, in complaining of this violation of its territory, called on the British Government to show a necessity for self-defence, instant, overwhelming;—leaving no choice of means and no time for deliberation;—and also that nothing was done in excess of the requirements of self-defence. In the negotiations which ensued Great Britain complained that a hostile expedition had been permitted by the United States Government to organise on American territory without any effort being made to suppress it; and that American citizens had supported the seditious movements directed against the safety of Canada. The United States Government, on the other hand, complained that the attack on the "Caroline" was not such as was warranted by the necessity of self-defence; that it was made upon a passenger ship at night; that it was an invasion of United States territory; and that though the case had been brought to the notice of the British Secretary for Foreign Affairs, unnecessary delay had taken place in the communication of his decision in the matter. The negotiations lasted over five years, but the matter was in the end settled amicably. The British Government expressed its regret for what had

occurred, and also that an apology had not been made at the time. At the same time, so far as related to the violation of the United States territory, it maintained (1) that there was no choice of means, for the reason that the American Government had already shown itself powerless in the matter; (2) that there was no time for deliberation, for the reason that invasion was imminent; and (3) that nothing had been done in excess of what the necessities of the occasion required, for the reason that the British forces had confined their action to the cutting adrift of the vessel, and so depriving the invaders of their means of access. The United States Government ultimately accepted these explanations.

There are cases in which even the violation of the territory of another State may be excused, on the grounds of necessity and self-defence. But for this it must be shown that injury of a very grave character was threatened; that there was no other means of avoiding it; and that nothing was done in excess of the requirements of self-preservation. In the case of *The Caroline*, the Government of the United States virtually admitted the existence of this principle; but called on Great Britain to show that such instant and overwhelming necessity as would alone excuse the violation of the territory of another State existed. The British argument was all the more effective, for the reason that the United States Government was itself in fault in allowing such enterprises against the safety of Canada to be undertaken on American soil. Another instance in which the same principle was relied on occurred in 1817, when the United States Government took upon itself the destruction of a band of buccaneers who, under pretence of being engaged in rebellion against the Spanish Government, had established themselves on Amelia Island, in Florida, then belonging to Spain, and thence made depredations on the commerce and adjoining territory of the United States (*h*).

The Alleged Right of Self-preservation.—Although it may be true that “in the last resort almost the whole of the duties of States are subordinated to the right of self-preservation” (*i*), yet it would seem that this so-called right cannot, generally, and in so far as it relates to the preservation of the national existence, be made the foundation of legal rules. It is a fact of international life which has to be

(*h*) See Wharton, *Digest*, i. 222; Moore, *Digest*, ii. § 216.

(*i*) Hall, 322.

reckoned with, and by which all international rules are conditioned or limited; but, like intervention (*k*), of which it is commonly put forward as one of the chief grounds, it belongs rather to the domain of political action than that of law. Nevertheless, for certain purposes, and within certain limits, the principle of self-protection or self-defence is recognised in international law, as in municipal law, as a justification or excuse for certain forms of extra-territorial action which would otherwise be unlawful; and to this extent it may be said to possess the character of a legal rule or principle.

Self-defence as a Justification for certain Forms of Extra-Territorial Action.—Amongst the more important applications of this principle we may include: (1) the right of a State to protect itself against an impending injury of a grave character, which is immediately threatened from the territory of another State, in circumstances where an appeal to the latter would be of no avail—the limits of which have already been considered in the case of *The Caroline*; (2) the right of a State to protect itself in the case where a similar injury is threatened from the high seas, by a vessel flying a foreign flag—the limits of which will be discussed subsequently in connection with the case of *The Virginius*; and (3) the right of all States to exercise a jurisdiction over vessels reasonably suspected of piracy, even though purporting to fly a foreign flag, to the extent of ascertaining their true character—the limits of which will be considered in connection with the case of *The Marianna Flora*. To the same principle are sometimes also referred such rights as—the right of belligerents in time of war to protect themselves against certain acts done by neutrals which are likely to prejudice the conduct of their military or naval operations;—the right of a State in certain cases to vindicate an infraction of its territorial laws by immediate pursuit and arrest even on the high seas;—and the right of a State to intervene for the protection of the persons, property, and interests of its nationals outside the limits of its own territory;—all of which will be considered hereafter in connection with the various topics to which they are appropriate.

SELF-DEFENCE AND PROTECTIVE JURISDICTION ON THE HIGH SEAS

THE CASE OF THE “VIRGINIUS”

[1873; Parl. Papers, 1874, vol. lxxvi; Moore, Digest, ii. 895.]

THE “*Virginius*” was a steamer which had been registered in 1870 in the port of New York as an American vessel, and had

(*k*) Save, perhaps, when resorted to as a matter of international police.

received a certificate in the usual form; but for some time prior to July, 1873, she had really been owned by and employed in the service of the Cuban insurgents. In July, 1873, when so employed, she left Kingston, in Jamaica, nominally for Limon Bay, in Costa Rica, but really for the coast of Cuba, and on being chased by a Spanish warship put into Port-au-Prince, in Hayti; thence she proceeded again to the coast of Cuba, but whilst still on the open sea she was again chased and eventually captured on October 31 by the Spanish warship "Tornado". At the time of capture she had on board a large quantity of arms and ammunition, as well as a large number of passengers, many of whom intended, as there was reason to believe, to join the insurgent forces in Cuba, and some of whom were, indeed, alleged to be leaders of the insurrection, although others, including some of the British subjects, had shipped in the belief that the vessel was really bound for Costa Rica. At the same time the "Virginus" offered, and was capable of offering, no resistance to search or capture; and her passengers were not at the time of capture armed or organised or capable, in their then position, of engaging in immediate hostilities. The vessel was thereupon taken into Santiago de Cuba, and the passengers and crew were detained on a charge of piracy and aiding rebels. Four of her passengers were tried by court-martial on November 3, and were shot on the 4th; later, sixteen British subjects, part of the crew, were similarly tried and shot, in spite of the protests of the British Consul; whilst seven others were detained in prison. Amongst those who were executed were also nine citizens of the United States. Great Britain then declared that she would hold the Spanish Government responsible for any further executions; reserving for the time being the question of the executions that had already taken place. The Spanish Government thereupon agreed to place the surviving British subjects at the disposal of the United States Government, in view of their having been captured on what purported to be a United States vessel; and also directed the Governor-General of Cuba to hold an investigation and report on the facts in order to ascertain if there were any right to indemnification.

Controversy.] In the controversy which ensued two main questions arose; one relating to the treatment and summary execution of British and American citizens; and the other to the

right of Spain to interfere on the high seas with a vessel carrying the American flag and entered on the American register.

With respect to the former question, the Spanish Government contended that, inasmuch as it appeared from the evidence, including declarations of the captain and some of the crew, that the "Virginia" had taken on board arms and ammunition; that she had then proceeded towards the coast of Cuba with a view to landing there; that she had on board some of the insurgent leaders as well as other persons for the reinforcement of the ranks of the insurgents—both the vessel and those on board were liable to be treated as piratical. In reply, Great Britain pointed out that no complaint was made, on her part, on account of the seizure of the vessel or detention of those on board. The ground of complaint was that, even assuming such seizure and detention to have been lawful, there was no justification for the summary execution of the prisoners, after an irregular proceeding before a drum-head court-martial. There was no pretence for treating the expedition as a case of piracy *jure gentium*; and even if the "Virginia" was to be regarded as a vessel piratically engaged in a hostile or belligerent enterprise, such treatment was still unjustifiable. Much might be excused in regard to acts done in self-defence, whether by a nation or an individual; but after the capture no pretension of an imminent necessity of self-defence could be alleged; and it then became the duty of the Spanish authorities to prosecute the offenders on a definite charge and according to the due legal forms. Had this been done, it would have been found that there was no charge, either under the law of nations or under any municipal law, under which persons in the situation of the British crew of the "Virginia" could justifiably have been condemned to death; for they owed no allegiance to Spain, their acts had been done outside Spanish jurisdiction, and they were in their employment essentially non-combatant. In the result the Spanish Government was compelled to make compensation. Similar compensation was exacted by the United States, and on similar grounds, in respect of the American citizens who had been summarily executed.

With respect to the seizure of the vessel, the United States Government also demanded reparation, on the ground that its rights had been violated by the arrest of the "Virginia" on

the high seas and whilst flying the American flag. As to this it was provisionally arranged, by a protocol of November 29, that Spain should restore the vessel and the survivors of the passengers and crew forthwith, and that she should further salute the United States flag on the ensuing December 25, unless she should in the meantime be able to show that the "Virginus" was not entitled to carry the United States flag. This question was then submitted to the United States Attorney-General, who after careful examination decided on the facts that the American registry of the "Virginus" was fraudulent, and that she was not at the time entitled to carry the American flag. At the same time he expressed an opinion that she was as much exempt from interference on the high seas as if she had been properly registered. Spain had, no doubt, a right to capture a vessel under the American flag and register, if found in her own waters, assisting the Cuban insurrection; but she had no right to capture such vessels on the high seas, under an apprehension that, in violation of the laws of the United States, they were on their way to assist the rebellion. Spain might defend her territory and people from the hostile attack of what was, or appeared to be, an American vessel; but she had no jurisdiction whatever over the question as to whether or not such vessel was on the high seas in violation of any law of the United States. At the same time, in view of the fact that the vessel was found to have had no title to carry the American flag, the salute to the United States flag was dispensed with; although the vessel herself was handed over to the United States authorities.

The two questions in issue were, in substance, (1) whether the Spanish authorities were justified in their treatment of the prisoners who had been summarily executed, and (2) whether the arrest of the "Virginus" on the high seas was under the circumstances justifiable. With respect to the first of these questions,—the views expressed by the British Government may be regarded as a correct exposition of the law on this subject. Even if the expedition was an unlawful one, as it undoubtedly was, and even if the arrest of the vessel was justified as a defensive measure, those on board were at any rate entitled to a regular trial according to proper legal forms and on a definite charge. Neither the "Virginus" nor those on board had committed any acts of piracy prior to capture, nor was the vessel adapted to the commission of acts

of piracy. Even if she had been seized in territorial waters and in the act of landing her passengers this would not have amounted to piracy; for the reason that the immediate object was to join a well defined insurrectionary movement, already in existence, and having a political end. This might have been treason in municipal law, but was certainly not piracy *jure gentium*. Still less could the acts of those who were merely members of the crew, and who as foreign subjects owed no allegiance to Spain, be deemed to fall, even technically, within the category of acts of piracy. With respect to the arrest of the "*Virginus*" whilst carrying the American flag on the high seas, it would appear to be true, as was stated in the opinion of the United States Attorney-General (l), that the fact of the American registry having been fraudulently obtained under the American law—as distinct from being a mere forgery, in which case the vessel would have been virtually without national character—would not in itself have conferred on Spain a right of arrest on the high seas. Nevertheless, it would seem that the right of self-defence, as recognised by the law of nations, will confer on a State, in a case where its safety is threatened, a self-protective jurisdiction, which will entitle it, under circumstances of grave suspicion, to visit a vessel even whilst on the high seas and flying the flag of a foreign State, for the purpose of ascertaining her real object and destination, and will further entitle it, if the evidence warrants, to arrest such vessel and send her in for adjudication. But the danger must be imminent, and the circumstances, both as regards the local situation (m) and the conduct of the vessel, must be those of grave suspicion. In such a case, moreover, notification should at once be made to the State of the flag, and those on board the arrested vessel (n) should be placed at its disposal, with a view to their punishment under their own municipal law (o), thus for the reason that the jurisdiction in such a case is merely protective, and not punitive. If, on the other hand, the suspicion should prove unfounded, then an apology, and if necessary an indemnity, should be offered, for in such a case the arresting State must be deemed to act at its peril (p).

The Pursuit of Vessels from Territorial Waters.—In general, a State has no right, in time of peace, and on the high seas, to interfere with vessels belonging to another State, save in cases of piracy, and, as we have seen in the case of *The Virginus*, for the purposes of self-

(l) Although even this is not universally admitted; see the opinion of Dana, quoted in Taylor, 409, to the effect that the register of a foreign nation is not, by the law of nations, to be regarded as a conclusive guarantee of national character to all the world.

(m) *I.e.* reasonable proximity to the threatened territory.

(n) With the possible exception of subjects of the arresting State.

(o) See the Foreign Enlistment Act, 1870, ss. 5, 7, *The Salado*, L. R. 3 P. C. 218, and vol. II.

(p) On the subject generally, see Hall, 328, Taylor, 406, Westlake, 167.

protection. But a jurisdiction somewhat analogous to this is frequently asserted over foreign vessels that have escaped to the open sea, after committing some infraction of the local law of the Power effecting the arrest. This is sometimes called the law of "hot pursuit" (q), because it is an essential condition of its validity that the pursuit should be started immediately, and that the arrest should be effected, if at all, in the course of the pursuit. Subject to this, the pursuit may be continued indefinitely or until the vessel passes into the territorial waters of another State. The right of pursuit applies to offences against revenue laws or against fishery laws, or to any offence vitally affecting the interests or system of the territorial Power (r), such as a forcible rescue of prisoners in which the vessel participated; but it would not it seems, apply to mere breaches of local regulations, such as leaving without a clearance or against the orders of the port authority; for the reason that the exercise of such a jurisdiction is only conceded on the ground of self-protection. Nor will it apply except in cases where the vessel herself is in fault. Hence, if an offender should escape to a foreign vessel and be carried off as a passenger, the vessel could not be pursued beyond the limit of territorial waters; the proper remedy in such a case being a demand for extradition. The existence of this right of pursuit, however, is not universally admitted. It was asserted, not, indeed, as a strict right at international law, but as one the exercise of which is commonly acquiesced in, by Sir Charles Russell in his argument in the Behring Sea arbitration (s); but it was denied by Asser who, when acting as arbitrator in a seal-fishing dispute between Russia and the United States in 1891, adopted the view that a public vessel of one State was not entitled to pursue a vessel belonging to another State beyond the territorial waters, even though the latter had been guilty of illegal conduct within those waters (t). The rule, however, is good in principle, subject to the limitations suggested; and has the sanction of general if not universal usage. Apart from the right of pursuit, it is competent to any State to punish prior breaches of municipal law, as against vessels which subsequently re-enter its ports or territorial waters, and in English law it has been held by the Privy Council that, where a vessel leaves one port of the territorial Power, and thereafter enters another port, the local jurisdiction will extend to acts done even on the high seas, in any case where the offence is constituted by coming into port after having committed the acts complained of, and this even though the vessel is not otherwise subject to the territorial law (u).

(q) Piggott, *Nationality*, n. 36.

(r) Cf. the arrest by the U. S. of a Canadian vessel (the *I'm Alone*), March, 1929, for an alleged contravention of her liquor laws: *supra*, p. 151.

(s) See Westlake, i 173, and *per* Story, J., in *The Marianna Flora*.

(t) Scott, 364 n.

(u) *P. & O. Co. v. Kingston*, [1903] A. C. at. p. 477.

NATIONALITY

(i) NATIONALS BY BIRTH

THE TUNIS NATIONALITY DECREES

(1923), P. C. I. J. Series B, No. 4.

ON November 8, 1921, a decree was promulgated by the Bey in Tunis purporting to confer, with certain reservations, Tunisian nationality on all persons born on the territory, one of whose parents was born there. On the same day the President of the French Republic issued a decree purporting to confer, with certain reservations, French nationality on all persons one of whose parents was within the jurisdiction of the French tribunals of the Protectorate. Both decrees were published in the Tunisian Government Gazette on the same days, the decrees of the Bey preceding the French decree. Similar legislation was introduced at the same time and under similar circumstances in Morocco (French zone). On January 3 and 10, 1922, respectively Great Britain, through its British Ambassador in Paris, (1) protested against the application to British subjects of the decrees promulgated in Tunis, and (2) declared that Great Britain was unable to recognise that the decrees put into force in Morocco (French zone) applied in any way to persons entitled to British nationality. No *modus vivendi* having been found, and the suggestion of Great Britain that the matter should be referred to arbitration by virtue of the Convention of October 14, 1903, having been refused by France, on the ground that a third Power was involved and that "questions of nationality were too intimately connected with the actual constitution of a State to consider them as questions of an exclusively juridical character", Great Britain laid the dispute before the Council of the League of Nations, who referred the case to the Court for an advisory opinion in the following terms :

Whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone) on November 8, 1921, and their application to British subjects is or is not by international law a matter of domestic jurisdiction (Article 15, paragraph 8 of the Covenant).

Opinion.] Article 15 of the Covenant establishes the fundamental principle that any dispute likely to lead to a rupture

which is not submitted to arbitration in accordance with Article 13, shall be laid before the Council. The reservations generally made in arbitration treaties are not to be found in this article.

Having regard to this very wide competence possessed by the League of Nations, the Covenant contains an express reservation protecting the independence of States; this reservation is to be found in paragraph 8 of Article 15. Without this reservation the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations. Under the terms of paragraph 8 the League's interest in being able to make such recommendations as are deemed just and proper, in the circumstances, with a view to the maintenance of peace must, at a given point, give way to the equally essential interest of the individual State to maintain intact its independence in matters which international law recognises to be solely within its jurisdiction.

It must not, however, be forgotten that the provision contained in paragraph 8, in accordance with which the Council, in certain circumstances, is to confine itself to reporting that a question is, by international law, solely within the domestic jurisdiction of one party, is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation.

This consideration assumes especial importance in the case of a matter which, by international law, is, in principle, solely within the domestic jurisdiction of one party, but in regard to which the other party invokes international engagements which, in the opinion of that party, are of a nature to preclude in the particular case such exclusive jurisdiction. A difference of opinion exists between France and Great Britain as to how far it is necessary to proceed with an examination of these international engagements in order to reply to the question put to the Court.

It is certain—and this has been recognised by the Council in the case of the Aaland Islands—that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15.

It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable. But when once it appears that the legal grounds relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds, the provisions contained in paragraph 8 of Article 15 cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain of international law.

If, in order to reply to a question regarding exclusive jurisdiction, raised under paragraph 8, it were necessary to give an opinion upon the merits of the legal grounds invoked by the parties in this respect, this would hardly be in conformity with the system established by the Covenant for the pacific settlement of international disputes.

For the foregoing reasons, the Court holds, contrary to the final conclusions of the French Government, that it is called upon to consider the arguments and legal grounds advanced by the interested Governments only in so far as it is necessary in order to form an opinion upon the nature of the dispute. While it is obvious that these legal grounds and arguments cannot extend either the terms of the request submitted to the Court by the Council, or the competence conferred upon the Court by the Council's resolution, it is equally clear that the Court must consider them in order to form an opinion as to the nature of the dispute referred to in the said resolution—with regard to which the Court's opinion has been requested.

The question put by the Council of the League is answered in the negative.

The decrees in this case conflicted with our nationality laws (according to which persons born abroad of British subjects are themselves within His Majesty's allegiance as well as their children born before January 1, 1915). And when the French Government, in pursuance of the decrees, called to the colours persons of Maltese origin, born in Tunis and claimed as British subjects by Great Britain, the above controversy arose.

In the result an agreement was come to by exchange of notes on May 24, 1923, whereby the French Government undertook to take all necessary steps before January 1, 1924, to ensure a British subject born in Tunis of a British subject also born there should have the right to decline French nationality, but that this right should not extend to succeeding generations. So far as the Morocco decrees were concerned the question presented little practical interest and the parties contented themselves with maintaining their respective positions and reserving their rights.

The case, therefore, turns on a question of the interpretation of a treaty, but it arose out of a question as to nationality.

Nationality is the status or quality of belonging to some particular nation or State. It is primarily a question of municipal law, although at certain points it possesses importance also in international law. It may be acquired either by birth or by naturalisation; but as regards both methods of acquisition, it is governed in different systems by different principles. So far as relates to acquisition by birth, according to the municipal law of some States, this is determined by place of birth (*jus soli*). This principle formerly prevailed in all those European States which had been brought under the influence of feudalism; and constitutes still the basis of the law in Great Britain, the United States of America, and certain other countries, although in both the former countries it has now been modified by statute. According to the municipal law of other States, however, the original national character is determined by the nationality of the parents (*jus sanguinis*); generally of the father, but in some cases of the mother (a); a principle originally introduced by the *Code Napoléon* and now adopted by most European States, although often qualified in its practical application. By the common law, British nationality was conditional on having been born in allegiance to the Sovereign; and this, again, depended, subject to certain minor exceptions, on place of birth. In other words, by the common law, a person born within the British dominions is a "natural-born subject", whatever may have been the nationality of his parents; whilst a person born outside is an alien. And this character, moreover, could not formerly have been changed by any voluntary act on the part of the individual. In English law the term "subject" or "British subject", meaning a subject of the Crown, is commonly used to denote nationality.

Persons, subject to the Laws of a State.—The conception of a State involves, as we have seen, not only a "territorial" but also a "personal" factor, in the sense of a community of persons, who either compose or are temporarily attached to that body politic of which the "State" is the embodiment, and who are for the time being subject to

(a) As in the case of illegitimacy.

its sovereignty and jurisdiction. The "subjects" of a State, however, using the term in the sense of all who are for the time being subject to its laws, comprise a variety of different classes, of which the following are the more important: (1) First, there is a class of persons who may be described as nationals (b), comprising those who are politically and internationally members of the organised community represented by the State, and who share the national character whether "domiciled" within its territory or not, and whether they enjoy full civic privileges or not. (2) Next there is a class who may be described as "domiciled aliens", comprising persons who are politically members of some other State and who possess some other national character but who, by virtue of permanent residence within the State, owe to it a temporary allegiance (c), derive their civil status from its laws so long as their residence continues. Between domicile (*domicilium*) and nationality (*patria*) there is the further distinction, that a man cannot put off or resume nationality at will, whilst domicile depends primarily on will and intention, so long as this is evidenced by appropriate facts. (3) Finally, and omitting minor classes, such as persons subject in particular systems to special disabilities by virtue of their ethnic origin, there is a class of persons who are only transiently present in the State, whose political and civil status are both determined by the law of some other State, and who owe merely a local and temporary obedience to the laws of the State in which they happen to be.

The "Nationals" of a State.—The "nationals" of a State comprise, as we have seen, all persons who are politically members of the organised community which the State represents, all those, in fact, who share in that political relationship which exists between the individual and the State to which he owes allegiance. The attribute of State membership is commonly, although not necessarily, accompanied by the possession of, or by a capacity for, civic privileges in which case it is properly designated "citizenship". It may or may not be accompanied by residence or domicile within the limits of the State, but even if it is not, the status which nationality confers will carry certain rights and obligations even when outside the limits of the State. This national character may be acquired either by birth, in accordance with one or other of the principles already described, or by naturalisation, including marriage and repatriation, or it may arise out of the cession or conquest of territory. Both the question of national character and its attendant privileges, and the question of the obligations which it involves, are governed by principles which differ greatly in different systems. At the same time the question of nationality possesses a certain importance in the domain of external relations, for the following reasons: (1) Every State claims within

(b) This is the term commonly used in treaties, and has the merit of not confounding national character with the possession of full civic rights: see Westlake, i, 213.

(c) See *De Jager v Att Gen of Natal*, *infra*, p 224.

certain limits a right to protect the persons of its nationals even when outside its own limits; whilst every State is also under a corresponding obligation as regards the treatment of the nationals of other States. (2) Every State represents also the proprietary interests of its nationals, as against other States; and may, irrespective of any question of their personal presence or residence within the territory of the latter, intervene, if it thinks fit, for the protection of such interests. (3) Every State also claims from its nationals, even when outside its territory, both allegiance and obedience to certain of its laws, to an extent which varies in different systems; and these obligations it will be entitled to enforce as against nationals who may be found within its jurisdiction; subject, however, if its competence should be questioned by other States, to proof of the retention of the national character. There are, moreover, some offences which it will be entitled to punish, even though the original national character has been abandoned; whilst it is doubtful whether a State is justified in adopting as its own the nationals of another State without the express or implied permission of the latter. (4) Finally, in some systems nationality, in others domicile, is regarded as the criterion of a man's civil status and personal law.

JOYCE v. DIRECTOR OF PUBLIC PROSECUTIONS

115 L. J. K. B. 146; [1946] A. C. 347; [1945] 2 A. E. R. 673.

WILLIAM JOYCE was born in the U.S.A. in 1906, the son of a naturalised American citizen who had formerly been a British subject. Joyce thereby became a natural-born American citizen. About the age of three he came with his parents to Ireland where he remained until 1921, when he came to England. He remained in England until 1939, having been brought up, educated and settled within the British dominions.

In 1933 he applied for, and was granted, a British passport for five years on his declaration that he was a British subject born in Galway. In 1938 this passport was renewed for one year, the same declaration being made. On August 24, 1939, there was a further renewal of this passport up to July 1, 1940. At some date after August 24, 1939, Joyce travelled to Germany, where, on September 18, 1939, he entered the service of the German Radio Company of Berlin as broadcaster in English. During the Second World War he broadcast propaganda for Germany, becoming notorious under the name of "Lord Haw-

Haw". There was no evidence as to what became of the passport nor of any use made of it subsequent to his departure from England.

After the occupation of Germany, Joyce was arrested in that country, brought to England and tried for treason on September 19, 1945, before Tucker, J., at the Central Criminal Court. On two counts of the indictment he was acquitted, the prosecution having failed to prove that he owed allegiance as a British subject. On a third count alleging that he, being a person owing allegiance to the Crown, adhered to the King's enemies in Germany between September 18, 1939, and July 2, 1940, he was convicted and sentenced to death, Tucker, J., having directed the jury that the question whether Joyce was a person owing allegiance was a question of law for the Judge, and that he held that Joyce did owe such allegiance.

The Court of Appeal upheld this decision. Appeal was taken to the House of Lords on the point of law.

Judgment.] The House of Lords (with Lord Porter dissenting) upheld the conviction.

The Lord Chancellor held that there was no doubt of the fact he had adhered to the King's enemies, but whether, on the facts, he could be held guilty of treason depended on the question of allegiance.

Allegiance was owed by natural-born subjects from their birth, by naturalised persons from their naturalisation, by aliens from the day on which they entered the Kingdom. At common law neither the natural-born nor naturalised subject could cast off his allegiance. *Nemo potest exuere patriam* was a fundamental maxim of the law from which relief had only been given by modern statutes. As to the alien resident, however, it had been argued that allegiance was only owed while he was so resident, and extended no further. This was at variance with the principle of the law and inconsistent with authority. In *Foster's Crown Cases* (3rd ed., p. 183), it was stated: "Local allegiance is founded in the protection a foreigner enjoyeth for his person, his family or effects, during his residence here; and it ceaseth whenever he withdraweth his family and effects. . . . And if such alien, seeking the protection of the Crown, and having a family and effects here, should, during a war with his

native country, go thither and there adhere to the King's enemies for purposes of hostility, he might be dealt with as a traitor. For he came and settled here under the protection of the Crown; and, though his person was removed for a time, his effects and family continued still under the same protection"—which rule, said Foster, was laid down by all the Judges assembled at the Queen's command in 1707. The reason of the rule was that the vicarious protection afforded to the family left behind in this country, required of the alien a continuance of his fidelity. It was therefore not true to say that an alien can never be guilty of treason in respect of an act committed outside the realm. In Joyce's case there was no evidence of vicarious protection. But being a long resident in the country and owing allegiance, Joyce applied for and obtained a passport, and leaving the realm adhered to the King's enemies. The essential fact was that he obtained the passport. In the case of a British subject it was true that the possession of a passport did not increase the Sovereign's duty of protection. But the possession of a passport by one who is not a British subject gives him rights and imposes upon the Sovereign obligations which would not otherwise have been given or imposed. It was immaterial that he had obtained it by misrepresentation and that he was not in law a British subject. By the possession of that document he was enabled to obtain in a foreign country the protection extended to British subjects.

It was the protection of the Sovereign, not the protection of the law only, which produced the claim to fidelity. Armed with a British passport he might demand from the State's representative abroad, and even from the officials of foreign governments, that he be treated as a British subject, and even in the territory of a hostile State might claim the intervention of the protecting Power. By holding the passport Joyce asserted and maintained the relation in which he formerly stood, claiming the continued protection of the Crown, and thereby pledging the continuance of its fidelity. The Court rejected the further contention that in any case no English Court had jurisdiction to try an alien for a crime committed abroad, and, holding that there had been no misdirection of the jury on the question of allegiance, dismissed the appeal.

Lord Porter dissented on the ground of misdirection. He agreed that in certain cases treason might be committed by an alien abroad, and that in Joyce's case the renewal of the passport on August 24, 1939, was evidence from which a jury might have inferred that he retained the document for use on or after September 18, 1939. The renewal of a passport might in a proper case lead to the conclusion that the possessor, though absent from the country, continued to owe allegiance to the British Crown, but, in his view, the question whether that duty was still in existence depended on the circumstances of the individual case, and was a question for the jury to determine. Unless the accused man continued to retain the passport for use as a potential protection, the duty of allegiance would cease, and it was for the jury to pronounce upon this matter. A reasonable jury properly directed might have considered that the allegiance had been terminated, and, in fact, they were not directed to consider the matter—they were told that it was a question of law and not for them. He held, therefore, that on the point of misdirection of the jury the appeal should have been allowed.

In this case the House of Lords applied the English law of treason to acts committed by an alien who had been for the greater part of his life settled in the British dominions, but who, at the time of adhering to the King's enemies, was resident in the enemy country. Within its own special circumstances the decision is now binding on all English Courts. It is, however, suggested that the case is one which stands on its own special circumstances, and that, if not confined to those circumstances, it would move the English law of treason in a direction desirable neither in the interests of that law itself, nor of the general principles of international law.

Treason is essentially a crime of a political character—an offence against a particular political community, which can be committed only by a person owing a special duty to that community, and by no means necessarily involving any high degree of moral depravity. It rests essentially on the doctrine of allegiance, which is owed primarily by subjects, natural born or naturalised. Reasons of security, however, dictate, and considerations of justice seem to allow, its extension under the title of local allegiance to aliens resident within the jurisdiction. An alien who resides in a country can hardly expect to be allowed to conspire, secure from the penalties of the law of treason, against the Government of a country, of which community he is a member and the

protection of whose laws and general privileges of membership he has continued to enjoy. Hence the doctrine that local allegiance over aliens depends upon the protection accorded by the Sovereign. Fidelity is owed in return for the protection given. Nor does the decision of the Judges in 1707, recorded by Foster, though stretching the principle, mark a radical change in the general principle. The alien, in the case mentioned, leaves his wife and family in the country, and adheres to the enemy abroad. His home, to which he may be presumed to intend to return at some later date, remains within the realm. The position is a border line one, and as the House of Lords' judgment mentions, had not won the approval of all authorities, but the facts of the case envisage a mere temporary removal in time of war without any genuine abandonment by the alien of his "stake in the country" in which he was previously settled.

In Joyce's case the House of Lords has gone well beyond the case of 1707. It has made the duty of allegiance depend in the case of an alien long resident and settled in the country, on the obtaining, retention, and use of a British passport.

That such a passport could not, after the outbreak of war on September 3, 1939, have afforded Joyce, had he been in fact a British subject, any protection, beyond the possible good offices of the representative of the neutral State in charge of British interests, may not be very material. But where the Lord Chancellor's judgment gives most difficulty is the assertion that the possession of a British passport by one who is not a British subject gives him rights and imposes upon the Sovereign obligations which would not otherwise have been given or imposed. By international law, as the judgment notes (quoting Oppenheim), the State has a right to protect its own subjects, when abroad.

But on the other hand the British Foreign Office have by international law no right, whether they grant him a British passport or not, to extend their protection in foreign countries to a citizen of the U.S.A. It is hard to see how, if a State does, through mistake or misrepresentation, what it has, in fact, no legal right to do, any rights or obligations can be given or imposed thereby as regards the holder of the passport. Even in the case of a person who has applied for naturalisation which has not yet been completed, such as in *Martin Costa's Case* (*infra*, p. 213), it has not been accepted that a right of protection exists. In Joyce's case, had he in time of peace when travelling in Germany invoked the protection which his passport purported to afford, upon proof that he was in fact a United States citizen, the British Government could not have insisted upon the maintenance of his case.

It might have been imagined that the effect of the grant of a passport to a person not entitled to possess it would have been that the document issued was simply invalid. The Lord Chancellor's conclusion appears to be otherwise.

There was no evidence as to the use of the passport after August 24, 1939. It is not unlikely that it was procured and used solely for the purpose of leaving England. There seems fair ground for Lord Porter's view that in any event there was a question of fact for the jury to decide whether the passport had been retained and used by the accused up to September 18, the first proved date of adherence to the enemy, which a jury, as they were directed, would fail to realise.

From the international standpoint, there was in this case an assumption of jurisdiction in a case of political crime committed by an alien abroad. It is true that jurisdiction exercised over crimes committed abroad by aliens appears to be in greater favour today than was formerly the case (see *Cutting's Case*, *infra* p. 243). But whether it is in the general interest that political offences such as that committed by Joyce should be prosecuted in the Courts of the State aggrieved, without regard to either nationality of the offender or the place of the commission of offence, appears controversial.

From the standpoint of the English law of treason the decision does not seem altogether satisfactory. It is perfectly true that the accused may deserve little sympathy, either from the cause, or political ideas, of which he became the mouthpiece, or from the fact, which clearly weighed with the Court, that, though technically a U.S.A. citizen, he had from his earliest days enjoyed the protection of the English law, and had been treated, and had acted, in every respect as a British subject. The decision, nevertheless, seems to some extent to be regretted. As the law appeared to many to stand before this decision, local allegiance ceased with the cessation of local connection. Even the Judges in 1707 seemed to insist on the local presence of wife, family, and effects, before the alien, absent *for a time*, could be charged with treason. There was a clear, substantial and reasonable boundary to the duty of allegiance. To make that duty turn on the fact of residence—on the protection afforded by the laws to the resident alien, or on the special danger to the State of the subversive activities of the enemy in our midst—seems in accord with reason and justice. Fidelity in this case depends on a protection which has some effective reality. A protection depending on the possession of a document to which the holder is not entitled is no real protection at all, either in time of peace or in an enemy country after the outbreak of war. To make the question of life or death hinge on the question whether the accused had or had not retained or returned a passport granted to him by mistake is to make the boundary line of the gravest offence known to the law turn on a technicality rather than on any broad dividing line of principle (*d*).

(*d*) With this case may be compared *R. v. Lynch*, *infra*, p. 216, and *De Jaeger v. Att.-Gen. of Natal*, *infra*, p. 224.

The Right of a State to protect the Persons and Property of its Nationals outside its Territory.—This right extends both to nationals by origin and nationals by adoption, even when present or resident within the limits of another State. Such persons are, it is true, primarily subject to the law of the country in which they happen to be present; and in entering into or taking up their residence within its territory they must be deemed to accept the local law as they find it, together with such risks as are manifestly attendant on local conditions. Nevertheless, they may claim, and their State may extend to them, its protection, if they are without just cause subjected to violent or injurious treatment, or denied justice, or unfairly discriminated against in matters pertaining to ordinary life (*e*). The same right of protection over its nationals, when present or resident in a foreign country, will in certain circumstances apply, even as against a State other than the territorial Power; as where a belligerent invader subjects them to treatment not warranted by the usages of war. It will extend also to injuries inflicted on them in derogation of the law of nations, either on the high seas, or in territory not occupied by any civilised State. It is not usual, however, for a State to assume any obligation as regards the relief of its destitute nationals when abroad, except in the case of seamen (*f*). A claim has been made by some States to treat persons who are connected with the State by some tie falling short of the full national character, such as persons who have fulfilled some but not all the conditions necessary to complete naturalisation, or persons who are connected with the State merely by domicile, as the objects of its national protection. Much the same principles apply to the protection of the proprietary interests of its nationals, whether they are personally present within the territory of the State against which protection is sought, or not; although the question of contractual claims has now been made the subject of special treatment as regards States that have adopted the Convention of 1907 for limiting the employment of force for the recovery of contract debts.

The Right of a State to interpose on behalf of Contractual Claims of its Nationals.—The right of a State to protect the property of its nationals as against other States may under certain circumstances extend to claims arising out of contract; although the limits of this right are not well defined. Where such contracts have been made with private persons in a foreign country, a State has clearly no right to intervene, except on the ground of some manifest denial of justice to, or improper discrimination against, its nationals. Even where such a contract has been made with the foreign State itself, it would seem that the home State is not justified in doing more than using its good offices, save in the case when the breach complained of assumes the form of an act of confiscation, not remediable by ordinary process of law. It is probably in view of the inadequacy of ordinary process

(*e*) Hall, 331.

(*f*) Wharton, Digest, ii. p. 455.

that, in the case where a State makes default in the payment of its public debt, the principle hitherto followed has been that any State, whose nationals are injuriously affected by such default, is justified in intervening on their behalf; although it will be a matter of discretion, depending on the circumstances of each case, whether such intervention should actually take place, and what form of redress should be resorted to in the event of failure to obtain satisfaction (*g*). This rule, whilst it appears to be correct in principle, is at the same time sufficiently flexible to enable the right of intervention to be confined, as it commonly is in practice, to cases of flagrant dishonesty, or unjust discrimination against foreigners. At the same time great exception has been taken to this view (*h*); and by the Hague Convention of 1907 it was agreed that the contracting Powers shall not have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another as being due to its nationals; although this is not to apply where the debtor State either refuses arbitration, or after accepting it prevents a settlement of the terms of reference, or fails to submit to the award.

Statelessness

STOECK v. THE PUBLIC TRUSTEE

90 L. J. Ch. 366; [1921] 2 Ch. 67.

CERTAIN property belonging to the plaintiff Stoeck had come into the hands of the Public Trustee by virtue of the measures taken during the First World War against property owned by enemy aliens. By the Treaty of Versailles, 1919, Part X, section 4, article 297, the Allied and Associated Powers had reserved the right to retain and liquidate the property of German nationals within their territory, and the Treaty of Peace Order, 1919, had been issued for the carrying of this provision into effect. Stoeck claimed that he was not a German national and that the property in question was therefore exempt from liability to liquidation under the terms of the Peace Treaty. Stoeck was at the time resident in Germany, to which country he had returned, after deportation from England to Holland in 1918.

(*g*) Hall, 331, and references there given.

(*h*) The contrary view is commonly known as the Drago doctrine, but is only adopted by The Hague Convention in a qualified form; see *The Venezuelan Preferential Case*, Scott's Hague Reports, p. 55.

He had been born in Rhenish Prussia in 1872, but in 1895 he had left Prussian territory and went to live in Belgium. In 1896 he obtained his discharge from Prussian nationality under German law. He never subsequently applied for, or obtained, the nationality of any German State. In November, 1896, he quitted Belgium for England, which he made his permanent home, but was never naturalised. In 1916 he was interned, and in 1918 deported to Holland, whence he returned to Germany.

Russell, J., was satisfied by the evidence as to German law that under that law he had lost his German nationality in 1896, and had not retained it for any purpose. Under that law he was stateless. Was statelessness possible either under international or English law? In international law, though opinions of writers differed on this question, it was generally recognised that the question to what State a person belonged to must ultimately be settled by the municipal law of the State to which he claims, or is alleged to belong, and, if no State exists, according to the municipal law of which a given individual is its national, it was difficult to see why anyone should close his eyes to the possibility that he was stateless. German law recognised statelessness, and examining such authority on the matter as existed, he concluded that the condition of a stateless person is also recognised by English law.

The question, which in 1921 still seemed unsettled, as to the possibility of statelessness is now clearly settled in the affirmative. The Russian Revolution and the legislation of Soviet Russia resulted in a great increase in the numbers of persons whose former nationality had been lost, and unless these acquired another nationality by naturalisation they remained stateless. As nationality is the chief link between individuals and any protection afforded by international law, the position of a stateless person is not always enviable. See, for example, the position of the Jews in Roumania before 1919 (*i*), and the Hague Codification Conference of 1930 endeavoured to reduce the possibility of statelessness (*k*). By a Convention of October 28, 1933, concerning the international status of refugees, the contracting parties undertook certain obligations as to their treatment, such as the granting of "Nansen" passports—a form of passport designed for such persons;

(*i*) Oppenheim, 5th ed., I. 533 *n*.

(*k*) Oppenheim, I. 534–5.

freedom of access to the Courts and exemption from the requirement of reciprocity existing in some cases, such as the provision of the security for costs in litigation, in the case of aliens and non expulsion except for reasons of public order. There was a similar treaty as to the Status of Refugees from Germany, 1936 (1)

The Original Acquisition of National Character.—With respect to the British character, it has already been pointed out that under the common law the status of a natural born subject "depends on allegiance, and allegiance, again, on place of birth. This rule is, however, subject to a variety of exceptions both at common law and by statute. Thus, even at common law the children of a British King or ambassador born on foreign soil or children born on a British public vessel anywhere or on a private vessel on the high seas, are regarded as British natural born subjects, whilst children of a foreign Sovereign or ambassador born on British soil, or children born to alien enemies in hostile occupation of British soil are regarded as aliens. British nationality is determined mainly by the Nationality and Status of Aliens Act 1914 (4 & 5 Geo 5 c 17), as amended by the Acts of 1922 and 1933.

Dual National Character; Election or Disclaimer.—A conflict of nationality may arise in various ways. In the first place, owing to the fact that nationality depends on municipal law and that no uniform rules exist for the purpose of ascertaining it, a person may, from the circumstances of his birth be invested with a different national character under the laws of different States. To meet such cases municipal law often confers on the person whose nationality is thus rendered doubtful an option to declare for one national character, either by way of disclaimer or by positive election. In the second place, a conflict of nationality may often arise, as indeed, happened in the *Bourgoise Case* (m), in consequence of the naturalisation in one State of the nationals of another, who by reason either of some defect of authority, or of service unfulfilled in their State of origin, are still treated as nationals under the laws of the latter. This question will however, be considered hereafter in connection with the subject of expatriation. A similar conflict may also arise under the regulations of different municipal systems relating to the effect of marriage on nationality, or the status of illegitimate children (n). It needs to be noticed that, under the English law, in the case of persons as to whose right to be deemed British subjects a doubt exists, the Secretary of State is empowered to grant a special certificate of naturalisation (o), whilst the same question may in certain cases be

(1) Treaty Series No 33 (1936) Cmd 5338

(m) *Infra* p 206

(n) See Hall 298. Oppenheim 1 529, and for a suggested rule reasonably applicable to cases of conflict, Westlake, 1 223

(o) British Nationality and Status of Aliens Act, 1914, s 4

referred to the decision of the Court, by means of a petition presented under the Legitimacy (and Nationality) Declaration Act, 1868.

Absence of National Character.—Under certain circumstances, on the other hand, it is possible for a person to be destitute of national character. So, under the law of some European countries a subject forfeits his national character by emigrating without intention to return, and such a person, unless naturalised elsewhere, possesses no national character. In such cases it has been suggested that it would be useful to adopt a practice of ascribing to such persons the nationality of the country in which they are domiciled (*p*). It has been decided that the condition of a State-less person is not unrecognised in English law. See *Stoeck v. Public Trustee*, [1921] 2 Ch. 67.

(ii) NATIONALS BY ADOPTION: NATURALISATION

RE BOURGOISE

(1889), 41 Ch. D. 310.

IN 1866 M. Bourgoise, a French subject, came to reside in England; and in 1871, having then resided in England for five years, he obtained a certificate of naturalisation under the Naturalisation Act, 1870. In 1880 he married an Englishwoman, a widow; but soon afterwards returned to France, where he resided until 1886, when he died, leaving a widow and two children, both of whom were born in France and had always resided there. In 1887 the widow also died, leaving a declaration in writing, expressing a desire that the children should be placed under the guardianship of one William Henry Johns, her son by a former marriage. Disputes arose over the guardianship of the children, with the result that the French Courts appointed the paternal grandmother as guardian. A considerable part of the estate of the father consisted of personal property in England; and subsequently proceedings were taken in England on the part of the infants by William Henry Johns, as their next friend, asking that he might be appointed guardian of their persons and estates. The question was whether the English Court had

(*p*) See Hall, 299.

jurisdiction to entertain the application. This appeared to depend on whether the children were to be regarded as British subjects; and this, again, on whether the English certificate of naturalisation had the effect of making their father a British subject, notwithstanding his subsequent return to his country of origin. On behalf of the French guardians it was contended (1) that, according to French law, no Frenchman could be effectually naturalised in another country without the assent of the Government, and that inasmuch as M. Bourgoise had not obtained this authority the naturalisation in England was inoperative; and (2) that under the provisions of section 7 of the Naturalisation Act itself the naturalisation of M. Bourgoise in England was only a qualified naturalisation, and did not affect his quality of French citizen on his subsequent return to France. On the first point the evidence as to the French law was somewhat conflicting; and in any case it was contended by the applicants that such a decree as that alleged, a decree of Napoleon I, of 1811, could not invalidate a naturalisation duly effected under the laws of another country. As to the second point, section 7 of the Naturalisation Act provides, in effect, that an alien to whom a certificate has been granted shall be entitled to all the privileges and subject to all the obligations to which a natural-born British subject is entitled or subject in the United Kingdom, but with the qualification "that he shall not, when within the limits of the foreign State of which he was a subject previously to his obtaining a certificate of naturalisation, be deemed a British subject, unless he has ceased to be a subject of that State in pursuance of the laws thereof, or in pursuance of a treaty to that effect". In the result it was held both by Kay, J., and subsequently by the Court of Appeal, that the Court had no jurisdiction to appoint an English guardian to the infants.

Judgments.] Kay, J., in his judgment, in view of the qualification contained in section 7, and of the fact that this was repeated on the certificate of naturalisation, held that the English naturalisation was merely partial, and only had the effect of making the recipient a British subject so long as he did not reside in his original country, unless under the law of that country he had ceased to be a subject to all intents and purposes. As a matter of fact, the French law did not appear to adopt that view of the naturalisation in question. On the contrary, it

prohibited the naturalisation of its subjects without authority; and in the present case no such authority had been obtained. Hence M. Bourgoise must at the time of his death be deemed, together with his children, to have been subjects of France. The Court, accordingly, had no jurisdiction to interfere by the appointment of guardians. The judgments delivered in the Court of Appeal do not contain any definite pronouncement on this question; but are all based on the view that the children having been born in France, and having been treated as French by French law, and the French Courts having already exercised jurisdiction in the matter, it would not be right for an English Court to interfere.

Although the decision in this case relates to a question of English municipal law, and is, since our Nationality Acts, 1914-1933, rather of historic interest, yet the case itself opens up a number of interesting questions on the subject of naturalisation, which have given rise to considerable discussion (q). Amongst these are the following: (1) Can a subject or citizen of one State be said to be effectually naturalised in another, in derogation of the law of the State of origin? This question was not decided in *Re Bourgoise*; but will be considered hereafter in connection with the right of expatriation. (2) Assuming M. Bourgoise to have been effectually naturalised in the United Kingdom, did this serve to confer on him the British character on his return to France? This was answered by Kay, J., in the negative, on the ground that the Naturalisation Act only conferred the rights and obligations annexed to the status of British subjects in the United Kingdom, and expressly excluded such an effect in the country of origin, unless the person naturalised had ceased to be a subject of that State in accordance with its laws; which was not the case, as regards M. Bourgoise, for the reason that it had been effected without the sanction required by French law. The provisions of section 7 on which this decision was based appear to be somewhat illogical, in so far as they purport to confer the rights and obligations incident to the British character only in the United Kingdom, and then proceed to annex certain qualifications on the assumption that they apply outside the United Kingdom. The section probably represents a crude attempt to frame a rule which would be at once in harmony with the unsettled state of international usage on this subject, and with the claims of certain British dependencies to settle questions of citizenship for themselves. To this end the bestowal by naturalisation of the rights and duties of a British

(q) See L. Q. R., vol. iv, p. 226; vol. v, p. 438; vol. vi, p. 379.

subject was specifically limited to the United Kingdom. At the same time the qualification, which would otherwise be meaningless seems to carry by implication an attribution of the British character generally, which will avail in all foreign countries except the country of origin, and even in the country of origin if the naturalisation has been recognised by local law or by treaty. The latter view is also borne out by the official practice under which a naturalised British subject is commonly regarded as entitled to aid and protection in all foreign countries except the country of origin, although naturalisation in the United Kingdom has no direct effect in a British colony or dependency (r). In the result, it would seem that naturalisation under section 7 will have the effect of conferring on the person naturalised the status of British subject, from the point of view of any Court or other authority in the United Kingdom that may be called on to deal with any question incident thereto, and this whether the person naturalised be in the United Kingdom or not subject to the proviso that he will not be deemed to possess the status of a British subject when in the country of his origin, unless his British naturalisation is recognised by its laws or by treaty. This appears at once to be a reasonable construction and not inconsistent with the decision of *Re Bourgoise*. But the proviso in section 7 is not repeated in the corresponding section 3 of the Act of 1914, and consequently a naturalised British subject would appear to be entitled to protection even in the country of his origin. (3) Another question suggested by the case is, whether the status of British subject as conferred by naturalisation could be said to descend to his after born children born abroad. In the case of children already born, these, if resident with the naturalised father in the United Kingdom, during infancy, share in the consequences of his naturalisation under the provisions of the Naturalisation Act, 1870 (s). If born subsequently in the United Kingdom, they will inherit the British character, under the general law. But now, if born abroad of a naturalised British subject, by section 1 (1) of the Nationality and Status of Aliens Act, 1914, they are deemed to be natural born British subjects. (4) Finally the case serves to bring into relief the question of dual national character or conflicting nationality, a question which has already been considered. *M. Bourgoise*, for instance, although a British subject according to the law of England, whilst in the United Kingdom, remained a French citizen in the contemplation of the law of France (t).

Naturalisation : Generally.—Naturalisation, in its widest sense, would seem to cover the admission by a State, by whatsoever process, of any person or body of persons, previously alien, to the status of citizens or

(r) See Circular of 1824 and on the question generally, Piggott *Nationality* 113 *et seq*.

(s) Section 10 (5).

(t) On the subject of double nationality, see Westlake, 1 221.

subjects, with a consequent right to the national character. It includes both the naturalisation of individuals, whether by express act of adoption or by implication of law; and the naturalisation of whole communities, as may occur on the incorporation of new territory by virtue of conquest or cession (*u*). The bestowal of the national character, however, does not necessarily imply admission to the full privileges of citizenship (*a*). The naturalisation of individuals may be effected either expressly, as where it is conferred by legislative enactment, administrative decree, or the grant of letters or of a certificate of naturalisation; or by implication of law, as where it is made to attend on marriage with a subject or citizen, or where it is made to attach to residence or to the acquisition of landed property (*b*). The methods and conditions of naturalisation differ greatly in different municipal systems. These touch on international law only in so far as they involve the assumption of a new national character, with a consequent discarding of the earlier allegiance and its attendant obligations. It is in view of this latter consequence that disputes over naturalisation commonly arise between States. The State of origin, on the one hand, claims to hold its former subjects bound by obligations arising out of their original allegiance, except where this has been dissolved with its express or implied assent; whilst the adopting State, on the other hand, claims a right to protect persons who have duly assumed its national character from claims which are only incident to a status that has been discarded. So there arise two classes of questions with respect to naturalisation: (1) a question as to the conditions necessary to its accomplishment in the State to which the person in question seeks to affiliate himself, which is a question of municipal law, although it not infrequently emerges in the course of international controversy; and (2) a question as to how far the naturalising State is bound, whether in law or comity, either to make its naturalisation contingent on the assent of the State of origin, or, at any rate, not to frame its naturalisation laws in such a way as to afford to the nationals of other States undue facilities for avoiding their obligations to the State of origin.

(i) *Naturalisation in the United Kingdom* (*c*).—This subject is now governed mainly by the British Nationality and Status of Aliens Acts, 1914-1918. The British Nationality and Status of Aliens Act, 1914, provides that an alien, who has resided in the United Kingdom for not less than five years, or has been for that period in the service of the Crown within the last eight years, and is of good character and has an adequate knowledge of the English language, and intends to continue such residence or service, may apply to one of His Majesty's principal Secretaries of State, and may, on furnishing the requisite evidence

(*u*) As to collective naturalisation, see *Boyd v. Thayer*, 143 U. S. 135; *Contzen v. U. S.*, 179 U. S. 191; and Hall, 685.

(*a*) Hall, 685.

(*b*) Hall, 267.

(*c*) As to denization, see Steph. Com. ii. 546.

and taking the oath of allegiance, receive a certificate of naturalisation, although the issue of such certificate is altogether discretionary. As we have already seen, a person to whom such certificate has been granted, and who has also taken the oath of allegiance, will then be entitled to all the rights, powers and privileges and subject to all the duties and obligations to which a natural-born British subject is entitled or subject, and to have to all intents and purposes the status of a natural-born British subject. Although by the common law marriage had no effect on the nationality of a woman (d), it is now provided that a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject; with the result that the marriage of an alien woman with a British subject makes her a British subject, and conversely the marriage of a British woman with an alien makes her an alien. But if a man ceases to be a British subject during the continuance of his marriage, his wife may make a declaration that she desires to retain her British nationality, and thereupon she shall be deemed to remain a British subject. Conversely, by the Nationality Act of 1933, the wife of an alien becoming naturalised as a British subject does not become British unless within one year she declares her intention so to do. And a British woman who has become an alien by marriage may on becoming a widow obtain a certificate of readmission to British nationality. The effect of naturalisation is also extended to the children of a naturalised father or mother (being a widow) who may be resident with their father or mother (as the case may be) in the United Kingdom during infancy.

(ii) *In British Colonies*.—By the British Nationality and Status of Aliens Acts, 1914–18, s. 8, the Government of any British possession has the same power to grant or revoke a certificate of imperial naturalisation as the Secretary of State of the United Kingdom, but such certificate is subject to the approval of the Secretary of State, except in the case of India or a Dominion. In the absence of such approval a person naturalised in such a British possession is not a subject of the United Kingdom, although for international purposes he is regarded as a subject of the British Crown. But by section 9, the Dominions may adopt Part II of the Act, in which case persons naturalised in accordance with its provisions acquire imperial naturalisation. At the same time, by colonial legislation a certificate of naturalisation in the United Kingdom is frequently accepted as a sufficient foundation for the issue of a local certificate; whilst the system of naturalisation actually adopted is for the most part modelled on that of the United Kingdom, although sometimes subject to the denial of particular rights. Thus, by the naturalisation Act, 1903, adopted by the Commonwealth of Australia, an alien who has resided for two years in the Commonwealth, or who has been previously granted a certificate of naturalisation in the United Kingdom, and who intends to settle in the Commonwealth,

(d) *The Countess of Conway's Case*, 2 Knapp, at p. 367; and *De Wall's Case*, 12 Jur. (P. C.) 145.

may apply for an Australian certificate; and, subject to certain evidence as to character and residence, or, in the case of the holder of a British certificate, as to identity, and the taking of the oath of allegiance where this has not been previously taken, the Governor-General may at his discretion issue such certificate. Thereupon the person so naturalised will be entitled, within the territory of the Commonwealth, to all the rights, and liable to all the obligations, of a British subject, except in matters where a distinction is drawn between natural-born and naturalised subjects (e). But in this as in other cases, although colonial naturalisation only purports to confer the privileges of British subjects within the limits of the possession, it is nevertheless officially treated in practice as conferring a right to the British character even in foreign countries, other than the country of origin. Thus, persons naturalised in British possessions receive passports as British subjects, and are also accorded diplomatic protection when in foreign countries; whilst they are also recognised by statute as capable of being registered as owners of British vessels (f).

In *R. v. Prozesky*, J. S. C. L. No. 1 of 1901, p. 74, it was held that a German resident in Natal who had taken the oath of allegiance and had been entered on the voters' roll as a naturalised subject, even though by mistake no letters of naturalisation had been issued to him, was triable for treason.

In *R. v. Francis, ex p. Markwald*, [1918] 1 K. B. 617, Markwald was born in Germany in 1859, and in 1878 went to Australia, where in 1908 he took the oath of allegiance and was granted a certificate of naturalisation under the Australian Act, 1903. He subsequently came to reside in London, and was charged and convicted of being an alien. It was held by A. T. Lawrence, J., that the taking of the oath of allegiance and the grant of the certificate did not make Markwald a British subject of the United Kingdom. Allegiance exists before any oath has been taken. A natural-born subject owes *natural* allegiance, an alien *local* allegiance. "The oath of allegiance does but consecrate the allegiance already existing. Markwald's allegiance was local allegiance, and no authority had been given by the sovereign power to any one to accept any wider allegiance from him." (See also *Markwald v. Att.-Gen.*, [1920] 1 Ch. 348.)

Naturalisation by Marriage.—According to the law of most countries, the marriage of a woman implies the adoption by her of the nationality of her husband. Hence the marriage of an alien woman with a citizen or subject commonly has the effect of naturalising her; whilst the marriage of a female citizen or subject with an alien commonly operates as an abandonment of her former national character. So, again, according to the law of most countries, a subsequent change of nationality on the part of the husband, as by naturalisation, will

(e) Sections 5 to 8.

(f) See Merchant Shipping Act, 1894, s. 1. As to the attitude of other countries towards colonial naturalisation, see Westlake, i. 229; and as to nationality and naturalisation in India, Westlake, i. 231.

commonly extend also to the wife, as well as to minor children (*g*). There are, however, now in several countries important exceptions to these rules. Cf. for example, our Nationality Act, 1914, s. 10.

The Hague Convention of 1930 on questions relating to conflict of nationality laws provides that the wife only loses her nationality on marriage with a foreigner if she thereby acquires the nationality of her husband (Art. 8). Where the husband changes his nationality there is similar protection for the former nationality of the wife (Art. 9), and naturalisation of the husband does not effect a change in the wife's nationality without her consent (Art. 10). This Convention came into force between ten signatories in 1937, and Great Britain had already accepted its principles in the British Nationality and Status of Aliens Act, 1933 (23 & 24 Geo. 5, c. 49). Under this Act the wife of a man naturalised in Britain after 1933 does not become a British subject unless she declares within twelve months her desire to do so. Oppenheim i. 519.

MARTIN KOSZTA'S CASE

(1853), Wheaton's *International Law*, 6th English edition by Keith,
i. 316; Moore, *Digest*, iii. 820.

MARTIN KOSZTA, a Hungarian subject, a leader in the rebellion against Austria in 1848, took refuge in the United States, and there duly declared his intention of becoming naturalised. But before the five years necessary to complete naturalisation had expired he returned to Smyrna, having obtained from the United States Consul a travelling pass, stating that he was entitled to U.S. protection. Whilst at Smyrna he was arrested by the Austrian authorities, who claimed to have this right by virtue of certain treaties subsisting between Austria and Turkey, and was placed on board an Austrian man-of-war. A demand for his release was made by the American Consul, and supported by threat of force on the part of a United States war vessel then in port, with the result that, through the mediation of the French Consul-General, Koszta was surrendered into the custody of that officer, and sent back to the United States; the Austrian Government, however, reserving the right to proceed against him if he returned to Turkey.

Imperfect Naturalisation and Domicil.—A pretension has sometimes been made to treat as nationals, for the purpose of protection against other States, persons who have only partially completed the formalities necessary to naturalisation, or who are merely domiciled in the protecting State.

Kosztá's Case is one in which political sympathies perhaps led to action which if it went beyond strict legal rights yet served the end of substantial justice. Austria, if her interpretation of her treaty rights with Turkey was correct, which Turkey does not seem to have disputed, may have been entitled to arrest Kosztá, but the action was extremely ill advised. The arrest of a political refugee, who had all but become the naturalised subject of a foreign State, public opinion in which had sympathised with the rebellion, in a foreign country, was certain to arouse a resentment out of proportion to any gain resulting from the arrest. The United States authorities on the spot, viewing the circumstances as they appeared to be, took what was probably the only effective action open to them. The legality of the action taken seems to turn on the point whether Kosztá was within the jurisdiction of Austria when seized or whether he was kidnapped in a neutral country (see Moore, Digest III, p. 841), a point which does not seem to have been entirely cleared up.

Viewed in the light of the circumstances as they reasonably appeared at the time, under which such emergency acts must be judged, and more especially if the circumstances of the arrest were, as stated by Wheaton, not even professedly legal (*h*), it would seem that the United States authorities were justified in their action. An appeal to the territorial Power whose sovereignty had been violated was manifestly likely to prove abortive; Kosztá was apparently a citizen of and resident in the United States, and was also in possession of a United States passport; the crime alleged was political; and the subject was detained by violence on a foreign warship in neutral territory. But, as it subsequently appeared that the passport was wrongly issued, and as it could scarcely be pretended either that Kosztá was naturalised or that the fulfilment of certain preliminary forms was equivalent to naturalisation, the United States Government in the controversy which ensued, fell back on the claim that mere domicil confers a national character. Such a pretension would appear, however, in the present state of international law, to be altogether untenable. It is questionable in principle, because it ignores the subsisting distinction between *domicilium* and *patria*—the source of the civil as distinct from the political status (*i*);—whilst it also attributes to domicil

(*h*) Wheaton suggests that Kosztá was seized by persons in the pay of Austria, thrown into the sea, and thereupon picked up by the Austrian war vessel.

(*i*) Although, as will be seen hereafter, there are some States which do not recognise domicil even as a source of civil status.

a consequence which has not hitherto attached to it by custom (*k*). It is possible, indeed, that, in the future, permanent residence within the territory of a State, and the ties which it creates may come to replace the existing tests of national connection. And it may be that, even now, domicil within a State on the part of a person who is not strictly a national may confer a limited right of protection as against other States, especially in circumstances analogous to those of *Kosztka's* case. But in the present state of international law, it would seem that such a claim could not lawfully be put forward in derogation of a claim to jurisdiction within its own territory on the part of the State of which the individual in question was a national (*l*). And this appears to have been recognised, by the United States, in the subsequent case of *Simon Tousig* (*m*).

In that case an Austrian subject, who had emigrated to the United States without permission, and who had taken the necessary steps to become naturalised there, returned to Austria before completing his naturalisation, and was subsequently proceeded against for illegal emigration. He thereupon claimed the protection of the United States; but interference on his behalf was refused on the ground that inasmuch as he had once been subject to the laws of Austria, and had whilst so subject violated those laws, his withdrawal from the native jurisdiction and proposed acquisition of a different national character would not exempt him from their operation, if he again chose to subject himself to them (*n*).

The question of the effect of incomplete naturalisation has also arisen in more recent years in cases relating to claims. Thus in the case of *Edward A. Hilson Claim, U. S. v. Germany*, 1925, Mixed Claims Commission (19 A. J. I. L. 810 (1925); Scott and Jaeger, p. 169), Hilson, a British subject by birth, was radio operator on the U. S. steamship, *Columbian*, which in 1916 was captured by a German submarine. The crew being turned adrift in an open boat, Hilson suffered privations which injured his health. At the time Hilson had made a formal declaration of his intention of becoming a U. S. citizen, which would be completed under the Revised Statutes of the United States after three years service on a U. S. merchant ship. The same statutes, however, declared that a seaman who had made the declaration should for all purposes of protection be deemed to be an American citizen. The point at issue, however, was that Germany, under the Treaty of 1921, under which the Mixed Commission was sitting, had agreed to give compensation for losses suffered by American nationals. The tribunal, therefore, held that Hilson, at the time of the damage, did not owe permanent allegiance to the United States. He was then a British subject, and not an American national, so he had no rights under the Treaty.

(*k*) As to the restriction of domicil to civil consequences in English law, see *Ah Yin v. Christie*, 4 C. L. R. 1428.

(*l*) But as to the possible limits of this jurisdiction, see p. 245, *infra*.

(*m*) Wheaton (Lawrence), p. 229; and (Dana), p. 146.

(*n*) By Act of Congress of 1907 (ch. 2534) the issue of passports, after declaration and three years' residence, is now expressly authorised, subject to certain restrictions: but such a passport is not to confer a right to protection when in the country of which the bearer was previously a citizen. On the subject of expatriation generally, see Hall, 281; Westlake, i. 200; Taylor, 225.

(iii) LOSS OF NATIONAL CHARACTER ; REACQUISITION

THE KING v. LYNCH

[1903] 1 K. B. 444.

THIS was a trial at bar for high treason. In the indictment it was charged that the prisoner, a person born in Australia, of Irish parents, and therefore a British subject, had, during the war between Great Britain and the South African Republic, "adhered to the Queen's enemies". Amongst the overt acts charged and proved were : (1) that he had declared his willingness to take up arms for the Republic ; (2) that he had during the war taken an oath of allegiance to the Republic ; and (3) that he had in fact acted in co-operation with the military forces of the enemy. On behalf of the prisoner it was contended that he had been voluntarily naturalised in the Republic, by virtue of the right (of expatriation) conferred on British subjects by the Naturalisation Act, 1870, s. 6, and in accordance with the conditions of that Act ; and that he had thereupon ceased to be a British subject and become freed from all consequences attaching to the British nationality. On behalf of the Crown it was contended that, although it might ordinarily be open to a British subject by virtue of the Act, to divest himself of his British character by being naturalised elsewhere, yet it was not open to him to become naturalised in a foreign country during a state of war between that country and Great Britain ; that in such cases the very act of naturalisation would be a crime ; and that the Naturalisation Act, 1870, s. 6, was not intended to apply to an act in itself criminal. In the result it was held that section 6 did not empower a British subject to become naturalised in an enemy State in time of war ; and that the act of being naturalised was under such circumstances an act of treason, and no answer to an indictment for subsequently joining the military forces of the enemy.

Judgment.] Judgments were delivered by Lord Alverstone, C.J., Wills and Channell, JJ. In his judgment the Lord Chief Justice pointed out that the declaration of willingness to take up arms and the taking of the oath of allegiance, although they took place on the same day as the naturalisation, yet in fact preceded it. The other overt acts took place subsequently.

It was not disputed that the alleged naturalisation would afford no defence, but for the Naturalisation Act. Reliance was, however, placed on section 6 of that Act, which provided that "any British subject who has at any time before, or may at any time after, the passing of the Act, when in any foreign State and not under any disability, voluntarily become naturalised in such State, shall from and after the time of his so having become naturalised in such foreign State be deemed to have ceased to be a British subject, and be regarded as an alien". But even this provision would afford no defence as to the first two overt acts; for the reason that by section 15 it was provided that "where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien". But apart from this, section 6 did not empower a British subject to become naturalised in enemy country in time of war; and hence the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury. An act which was in itself an act of treason could not confer any rights; and whatever might be the effect of a declaration of war, it at any rate prevented British subjects from making arrangements with the King's enemies, when such arrangements would constitute crimes against the country to which they owed allegiance. Wills, J., in his judgment also pointed out that if the contention put forward by the prisoner were upheld, then a whole army might desert to the enemy on condition of being naturalised, and thus escape any liability for the penalties of treason.

By the common law of England, allegiance, with its attendant obligations, could not be divested by any act on the part of the individual himself; a rule embodied in the maxim *nemo potest exuere patriam*.

So, in the case of *Aeneas Macdonald*, 18 How. St. Tr. 858, it was held that a person originally born in allegiance to the Crown was liable to the penalties of treason for being found in arms against his native country; notwithstanding that he has spent all his earlier life in France, and his riper years in profitable employment in that country, and had also held a commission from its King; this conclusion being based on the ground that it was not in the power of a natural-born subject of Great Britain to shake off his allegiance or to transfer it to a foreign prince, nor was it in the power of any foreign prince, by naturalising or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown.

This principle was, however, abandoned by the Naturalisation Act, 1870, s. 6, which enabled natural-born subjects to discard their allegiance and its attendant obligations, either by being duly naturalised in another country, or in certain cases merely by a declaration of alienage. In *The King v. Lynch*, however, it was held that, in view of the express reservation contained in the Act of 1870, it could not be extended to cover acts of treason committed prior to the completion of naturalisation; and, further, that it was obviously not intended to sanction the naturalisation of a British subject by an enemy State in time of war.

THE CASE OF LUCIEN ALIBERT

(1852), U.S. Documents, 1859-60, n. 176.

LUCIEN ALIBERT, a French natural-born subject, went to the United States of America when about eighteen years of age, and before he had rendered the military service prescribed by French law. He was duly naturalised in the United States, but subsequently returned to France, where he was arrested as an *insoumis*; a person, that is, who has failed to join the colours when called upon. He pleaded his naturalisation in America, but was convicted, on the ground that in such a case an *insoumis* still remains liable to the penalty for evading military service. Subsequently, however, the sentence passed on him was remitted, on the ground that more than three years had elapsed between the time when he was naturalised and the date of his return to France; the offence in such a case being purged by prescription.

The case of Lucien Alibert serves to illustrate one of the incidents of nationality which still attaches in most European countries; in virtue of which emigration or expatriation, even though otherwise allowed, is nevertheless limited by the obligation of military service. Any violation of this commonly renders the offender liable to imprisonment if he returns to his own country, or to fine or forfeiture of any property that may accrue to him.

Loss of National Character—Expatriation.—The methods by which nationality may be lost differ in different systems. But in general they may be said to comprise (1) loss by naturalisation elsewhere, or by disclaimer in cases of conflict, or by marriage with an alien in the case of females, (2) loss by express deprivation or release (3) loss by abandonment and (4) in the case of communities, loss by transfer to some other State on cession or conquest. And these methods or such of them as are recognised in any particular system, commonly apply to the national character both as acquired by birth or by naturalisation.

Resumption of National Character—Repatriation.—Where a national by birth has lost his original national character by naturalisation or abandonment, provision is sometimes made, under the law of particular States, for repatriation, or for a resumption of that character, by methods less formal or cumbrous than those involved in ordinary naturalisation.

Is there a Right of Expatriation?—Expatriation denotes an abandonment or in some cases a deprivation of a former national character, with its attendant rights and obligations. This is in practice commonly followed by the assumption of a new national character and a new allegiance in its place. As regards the attitude of States towards the naturalisation of their own subjects by other countries—some States, as we have seen, regarded allegiance as indefeasible, although this doctrine is generally discarded. But many States still attach conditions to the abandonment of the national character, as that the consent of the State shall be obtained, or another character duly acquired although others recognise such an abandonment, in certain events, without further inquiry. All States, however, appear to regard the expatriation as being subject to a continuing liability for obligations incurred before it took place, whilst States which impose an obligation of military service on their nationals either make the act of expatriation contingent on the due performance of this, or subject anyone in default to penalties in the event of his return, or to forfeiture of any interest which he may have or acquire within the territory. As regards the attitude of States in the matter of granting naturalisation to the subjects of other countries—many States afford great facilities to foreigners in the matter of naturalisation, whilst some even affect to impose it by virtue of domicile alone. Under these circumstances, various questions of an international character are likely to arise (1) Is the naturalising State under any obligation either to recognise restrictions imposed by the State of origin on expatriation, or itself to impose reasonable restrictions on naturalisation? (2) If a State naturalises a foreigner, in derogation of the law of the State of origin, is it entitled to extend to him its protection, as against the latter? (3) How far, in the circumstances last suggested, are other States entitled or bound to recognise the new national character, whether as a source of privilege on the part of the individual or

as a ground of protection on the part of the naturalising State? On these points international usage is far from settled. The earlier tendency was to recognise the permanence of the original tie, until relaxed with the consent of the State of origin. And even now it is contended that the recognition of an absolute right of expatriation would be at once 'anarchical in principle and inconvenient in practice, and that it would be well if the right of every State to prescribe the conditions under which its nationals may discard their nationality were admitted, and if no acquisition of foreign nationality were recognised unless these conditions had been complied with, leaving it to the good sense of States to do away with such rules as are either vexatious or unnecessary for the safeguarding of the national welfare' (o). On the other hand the United States of America which was the State most largely concerned in this question, after some prior changes of attitude, finally declared, by Act of Congress passed in 1868, that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness", and that effect should be given to this view as against other States (p). In practice, however, the United States has found itself compelled to apply the quota system to immigration, so that this declaration comes rather under those stigmatised by Dicey. In practice the difficulties that arise from the unsettled state of international law on this subject have been in some measure surmounted by treaties made between particular States and it is not unlikely that this cause of difficulty will be ultimately settled by general international agreement. Meanwhile, and in the present state of international usage, it can scarcely be said that there is any general or unrestricted right of expatriation. Most States, even whilst conceding to their nationals a right of being naturalised elsewhere, yet concede this only subject to certain restrictions and conditions, many States also still restrict the application of their naturalisation laws or limit their effect, in deference to what are deemed to be inherent rights of the State of origin. A review of existing conditions leads, then, to the following conclusions. (1) A State in framing or administering its naturalisation laws is, in strictness, entitled to act without reference to the nationality laws of other States although comity requires that it should not frame or administer them in such a way as to encourage "the avoidance of reasonable obligations" due to other States by their respective nationals. (2) The competence of a State in naturalising the nationals of other States within its own territory cannot, of course, be questioned so long as they remain therein, whilst if they have been duly naturalised under the local law, this would probably also be recognised externally by all States other than the State of origin, as for the purpose of extradi-

(o) Hall, 293

(p) See Rev Stat ss 1999-2001, and on the subject generally, Kent, Com
11 43

tion (q). (3) But if the foreign naturalisation took place in derogation of the law of the State of origin, then the latter will, in strictness, be entitled to enforce its laws against the persons of its former nationals if they return, or against their property within its territory if they do not. (4) This right is, however, now often limited by treaty to obligations incurred before emigration; and a usage to that effect appears to be springing up irrespective of treaty. (5) In any case, moreover, if the foreign naturalisation involved either a breach of its laws or a violation of comity, the State of origin may, at its option, forbid its former nationals access to its territory or expel them if they enter (r).

Practice with respect to Expatriation: Great Britain.—With respect to her own subjects, Great Britain has, as we have seen, so far relaxed the earlier rule of indefeasible allegiance as to allow natural-born subjects to become naturalised in foreign States, when in a foreign State, and not under any disability, by obtaining a certificate of naturalisation or by other voluntary and formal act. Subject to these conditions, a British subject duly naturalised in a foreign State will be discharged from the consequences of his British nationality, save as mentioned below. Any person, moreover, who is a British subject by reason of having been born within the British Dominions, but who by the law of some foreign State is also regarded as a subject of that State, may if of full age, and not under any disability, renounce his British nationality by a declaration of alienage (s). And by section 15 a similar privilege may be also bestowed on naturalised subjects who may desire to resume their former nationality, in cases where a convention to that effect subsists between Great Britain and the State to which they previously belonged. But by section 16 the effect of such expatriation is not in any of these cases to relieve any person from liability as regards acts done before its occurrence.

*THE RIGHTS AND LIABILITIES OF ALIENS IN TIME OF
PEACE*

MUSGROVE v. CHUNG TEEONG TOY

60 L. J. P. C. 28; [1891] A. C. 272.

In this case the appellant, who was a Collector of Customs in the colony of Victoria, was sued by respondent, a Chinese immigrant, for having prevented the latter from landing; this

(q) Whilst, conversely, such a claim on the part of the State of origin would not be entertained. But in either case this would only apply as regards States that recognise personal jurisdiction as a ground for extradition.

(r) Hall, 298.

(s) Section 14.

having been done by order of the executive Government of the colony. On behalf of the respondent, it was contended that his exclusion was illegal, both on a proper construction of the Chinese Exclusion Acts in force in that colony and at common law. The Supreme Court of Victoria having found in favour of the present respondent, an appeal was thereupon taken to the Crown in Council. The Judicial Committee, after deciding against the respondent on the question of the construction of the colonial statutes, further held that under the general law an alien has no legal right enforceable by action to enter British territory.

Judgment.] Lord Halsbury, L.C., in delivering judgment on behalf of the Judicial Committee, after dealing with the question of the construction of the local statutes, observed that, apart from the latter question, the facts appearing on the record raised a grave question as to whether an alien had a legal right, enforceable by action, to enter British territory. There was no authority for such a proposition. Circumstances might occur in which the refusal to permit an alien to land might be such an interference with international comity as to lead to diplomatic remonstrances from the country of which he was a native. But it was quite another thing to assert that an alien, excluded from any part of the British Dominions by order of the executive Government, could maintain an action and raise such questions as had been argued in the present appeal as to whether the excluding officer had been duly authorised by the Colonial Government, as to whether the latter had received due authority from the Crown, and as to whether the Crown itself had the right to exclude an alien without the authority of Parliament. That an alien had a right to compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament, and the relations of the Mother Country to her self-governing colonies, was a proposition that could not be assented to. And, when once it was admitted that there was no absolute and unqualified right of action in such a case, it was, in the opinion of the Judicial Committee, clear that it would be impossible, on the facts admitted in the demurrer, for an alien to maintain an action.

Before this decision some doubt had been entertained as to whether there existed at common law a right on the part of alien friends to enter British territory. There was, indeed, no doubt that a right of exclusion, or even of expulsion, could be exercised by Parliament, and such a right had in fact been exercised on various occasions by the imperial Parliament, notably, in the period between 1793 and 1848 and also by various colonial legislatures. But it was so far not clear whether the executive Government, either of the United Kingdom or of a British colony, could exercise such a right without statutory sanction. In this case, however, the Privy Council definitely decided that an excluded alien in such a case has no remedy enforceable by action, and virtually, therefore, that he has no legal right to enter British territory (t). Nor does this conclusion appear to conflict with any international requirement, for, although the complete exclusion of the nationals of another State might be made a ground of complaint or retaliation, yet neither in law nor comity is a State prohibited from limiting or regulating the admission of aliens into its territory. In the United Kingdom, moreover, such restrictions are now sanctioned by statute. Thus, by the Aliens Act, 1905, the immigration of undesirable aliens was regulated and restricted, and power is also conferred on the executive to expel persons whose expulsion has been recommended by a Court in which they have been convicted, or who are certified by a Court as being without means of subsistence, or as having been sentenced in a foreign country, with which there is an extradition treaty, for an offence that would constitute an extradition offence under section 3 of the Extradition Act, 1870. At the same time it is provided that in the carrying out of the Act due regard shall be had to any treaty or convention subsisting with any foreign country (u). Until this statute it had been doubted whether the prerogative power to expel still survived, and it was argued that an alien friend, if arrested and ordered to be expelled, was entitled to a writ *of habeas corpus* (v). The Aliens Restriction Act, 1914 (4 & 5 Geo 5, c 12), was an emergency statute giving additional powers to the Crown (irrespective of the prerogative) to prohibit aliens from entering, to deport or to require them to reside or remain in certain districts or to prohibit them from residing in certain districts. By the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo 5, c 92), aliens attempting or committing acts calculated to cause sedition or disaffection or industrial unrest are liable to punishment, and former enemy aliens are not permitted to enter for three years after the passing of the Act without the permission of the Secretary of State (*R v Inspector of Leman Street*, and *R v Secretary of State for Home Affairs*, 36 T L R. 677).

(t) As to the right of expulsion under the law of certain dependencies, see *Re Adam*, 1 Moo P C 460.

(u) Section 7 (6), and see also 6 & 7 Will 4, c 11, as to the duties of masters of vessels as regards immigrant aliens.

(v) *F Craies*, 6 L Q R 27 (1890).

DE JAGER v. ATTORNEY-GENERAL OF NATAL

76 L. J. P. C. 62, [1907] A. C. 326.

DE JAGER was a burgher of the South African Republic, who had been for ten years resident in Natal. After the outbreak of the war between Great Britain and the South African Republic, in 1898, he continued to reside in that colony; and upon the occupation by the Republic of that portion of Natal in which he resided, he joined the invading forces, and subsequently acted as commandant and commissioner. Apparently he was compellable to do so under his national law, although the question of compulsion does not appear to have been raised. After the re-establishment of the British authority he was indicted for high treason, and, having been found guilty, was sentenced to five years' imprisonment and to pay a fine of £5,000. A petition to the Judicial Committee of the Privy Council for special leave to appeal was dismissed.

Judgment.] Lord Loreburn, L.C., in delivering the judgment of the Judicial Committee, said that it was old law that an alien resident within British territory owed allegiance to the Crown, and might be indicted for high treason, even though not a subject. Some authorities affirmed that this duty and liability arose from the fact that while in British territory he received the King's protection. But the protection of a State did not cease merely because the State forces, for strategical or other reasons, were temporarily withdrawn, so that the enemy for the time exercised the rights of an army in occupation. Such protection was in fact continuous, even though actual redress of what had been done amiss might be necessarily postponed until the enemy forces had been expelled. Under these circumstances the duty of an alien resident was so to act that the Crown should not be harmed by reason of its having admitted him as a resident. After referring to the modern practice by which enemy subjects were permitted to continue their residence even after the outbreak of war, it was pointed out that it would be intolerable, and must inevitably lead to a restriction of such international facilities, if, as soon as the enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms on behalf of the invaders.

This case serves to illustrate a rule which obtains not only in English law but also in other systems—that an alien, whether technically domiciled or not, who is actually resident in the territory of any State, owes a temporary and local allegiance to that State, so long as such residence continues, although it is competent to him at any time to release himself from the obligation by abandoning his residence (a) In *R v Badenhorst*, 21 N L R 227, where the facts were similar to those in *De Jager's Case*, it was urged on behalf of the prisoner that he had never acquired a domicile in Natal, but it was held that it was quite sufficient to create a temporary obligation of allegiance and obedience to the law if he had resided in Natal and was not merely a casual visitor. If indeed, on the outbreak of war he had gone back to the Transvaal and had subsequently returned with the forces of the enemy, he could not have been prosecuted for treason, for he would not then have been amenable to the laws of Natal, but inasmuch as he continued to reside there, and had the benefit and protection of its laws, he was not entitled, upon an invasion by the enemy, to cast his allegiance to the winds and to join their forces. An extension of the idea of temporary allegiance in English law appears in the decision of the House of Lords in *R v William Joyce* ("Lord Haw-Haw") in 1945. Joyce, an American citizen, had acquired a British passport under a mistake as to his true nationality. He left the country in 1939 with this passport, took up his residence in Germany and after the outbreak of war he was employed in broadcasting in English for the German Government. It was not proved what became of the passport. It was held that though an alien he still owed a sufficient temporary allegiance to support his conviction for treason, *supra*, p. 196. In the United Kingdom aliens are, by the Nationality Act, 1914, empowered to acquire, hold and dispose of both real and personal property, in the same manner as natural-born subjects, but it is expressly provided that the Act shall not qualify an alien for office, or for any municipal, parliamentary, or other franchise, nor to be the owner of a British ship, nor confer on him any right or privilege as a British subject except such as is expressly given to him (b). And these provisions also apply, in so far as may be necessary, to non-resident aliens. The expression "alien" is defined in the statute to mean "a person who is not a British subject". Resident aliens are, in fact, admitted to all common rights, including freedom of residence, and the right of access to the courts (c), under the same conditions as British subjects, together with the right of following any profession or calling, except where this right is expressly denied or qualified (d). These rights are sometimes expressly confirmed by treaties of friendship or commerce. Aliens may be required to serve on juries after ten

(a) See Hale, *Pleas of the Crown*, 1 ch. x.

(b) Section 17.

(c) Although it is perhaps doubtful if an alien could maintain a petition of right against the Crown, see Piggott *Nationality*, 1 176.

(d) See, by way of example, 49 & 50 Vict. c. 48, ss. 12 and 13.

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years' residence (e). With respect to statutes conferring privileges, it will be a question of interpretation in each case as to how far privileges conferred extend to aliens, whether resident or non-resident.

In *Routledge v. Low*, L. R. 3 H. L. 100, it was held that where personal rights are conferred on persons filling any character of which foreigners are capable, such foreigners will be deemed to be excluded, unless a contrary intention is expressed or implied.

In *Davidsson v. Hill*, [1901] 2 K. B. 606, it was held also that a foreigner might recover damages under Lord Campbell's Act for loss sustained by the death of relatives on the high seas in a collision occasioned by the negligence of a British vessel. In British colonies the position of resident aliens is for the most part very similar, save that persons belonging to certain excepted races are occasionally made the subject of special disabilities.

The Admission or Reception of Aliens.—"By inference from the sovereignty of States it is a well-established general principle that a State may forbid the entrance of aliens into its territory, or admit them only in such cases as commend themselves to its judgment" (f). In the United States and in the British Colonies before the First World War and in the United Kingdom since the First World War this principle has been applied without giving rise to legal consequences. Every State, on the other hand, also possesses the right, if it chooses, to grant asylum within its territory to refugees from other States; subject, of course, to the obligation of extradition where this exists by treaty; and subject also to its not allowing such persons to use the State territory as a base for enterprises injurious to other States (g).

Civil Obligations of Aliens.—Once within the territory of another State, aliens, save in those exceptional cases where a right of extritoriality exists either by usage or treaty, become subject to the local law and local jurisdiction, to an extent varying with the character of their residence. If merely passing through, or temporarily resident within the territory, they owe only a temporary obedience to the local laws, and possess only corresponding rights to protection (h).

But in the case where an alien becomes permanently resident, then, as was laid down in *R. v. Badendorst*, whether such residence amounts technically to a domicile or not, he will, whilst retaining an ultimate right to the protection of his own State, yet owe a provisional allegiance to the State under whose

(e) Juries Act, 1870, s. 8.

(f) Fenwick, 2nd ed., 190.

(g) On the subject generally, see Hall, 265 *et seq.*; Westlake, i. 208.

(h) As to the varying degrees of fixity involved in these relations, see Westlake, i. 203.

immediate protection he lives. He will further be liable to taxation, and will also be subject to the jurisdiction of the local Courts. And, although not subject to ordinary military service, he may be called on to aid in the maintenance of social order as a measure of police.

So, during the American Civil War, on a question arising whether British subjects resident in the United States were liable to serve in the army, the British Government stated that, whilst fully recognising that there was no rule or principle of international law which prohibited the Government of any country from requiring resident aliens to serve in the militia or police, or to contribute to the support of such establishments, it must nevertheless refuse to consent to British subjects being compelled to serve in the armies of either party where, "in addition to the ordinary incidents of battle, they would be exposed to be treated as traitors or rebels in a quarrel in which, as aliens, they had no concern." It therefore required that all who could prove their nationality should be exempted. It refused however, to interfere on behalf of subjects who had either been completely naturalised, or who had exercised the privileges of United States citizenship (i). And when at a later stage of the war the conscription was extended to persons who had declared an intention of becoming naturalised, subject to the alternative of exempting themselves by quitting the country within sixty five days, it again refused to interfere (k). Aliens are also liable to expulsion, where such a power is conferred by the local law, although any wholesale expulsion, or expulsion without just cause, would be a matter for protest, or even for retaliation (l).

Civil Rights of Aliens.—The position occupied by an alien in the matter of civil rights, when within the territory of a State other than his own, is again strictly a matter of municipal law. But in general aliens are allowed to hold personal property, and in many States real property also, although some States still forbid this (m). They are allowed to intermarry, to engage in trade or commerce, to enter into contracts, and to have recourse to the Courts as regards claims within their competence. But they are usually debarred from the exercise of public rights, and also from being registered as owners of vessels entitled to the national character, and sometimes also from following certain professions. As they owe a temporary allegiance to the local law, so they are entitled to its protection, and the State to which they belong is entitled to require from the State in which they reside that the latter shall ensure that laws for their protection are adequately

(i) For a list of these cases, see Halleck, i. 449 n.

(k) British Parl. Papers, North America, No 13, 1864, p. 34.

(l) On the subject generally, see Hall, 264, and as to the expulsion of aliens, Oppenheim, i. 549.

(m) This was the case in England formerly, and is still the case in some States, as well as in the territories of the United States.

enforced (n) At the same time they are not entitled to greater protection than native residents, and cannot, in general complain if they suffer only in common with other inhabitants of the country So, injury or damage suffered in the course of civil war or foreign invasion in common with native residents will not afford any cause of complaint against the territorial Power On this ground Great Britain refused to demand compensation for injuries inflicted on the property of British residents in the course of the American Civil War in 1863, or in the course of the German invasion of France in 1870 (o) By the Treaties of 1919-20 Germany and Austria undertook not to subject the property rights or interests of the nationals of the Allied or Associated Powers to any measures in derogation which are not applied equally to the property rights or interests of German or Austrian nationals respectively and in the event of any such derogation to pay adequate compensation (p)

Responsibility of the Territorial Power.—Nevertheless a resident alien occupies in some respects a better position than a native resident, for the reason that under certain conditions he will be entitled to fall back on the international responsibility of the State in which he resides, and for this purpose to appeal for protection to the State to which he belongs And this right applies not only as against the territorial Power but also as against a third Power So in time of war a belligerent invader who has inflicted injuries on the citizens of a neutral State resident within the invaded territory in violation of the laws of war may be held internationally responsible to the State to which such persons belong (q) The responsibility of the territorial Power in relation to nationals of other States present or resident within its limits may perhaps be summarised as follows (1) *Prima facie*, the nationals of one State who voluntarily enter or take up their residence within the territory of another State will be deemed to accept both its laws and its system of administration as they find them and also to accept any risks arising out of peculiar local conditions (2) Nevertheless, the territorial Power, if it allows such persons to enter and reside within its limits, and exercises jurisdiction over them, is required to treat them with reasonable consideration, to see that the existing law is adequately enforced on their behalf and to see that they are not denied justice or discriminated against in matters necessary to ordinary life (3) The territorial Power, moreover is bound not merely to see that its laws are fairly administered but also to provide laws and a system of administration that are not glaringly deficient according to civilised standards, together with a reasonable measure of protection,

(n) As to cases where the local law is defective, and the case of *Rahming*, see Hall 332

(o) Taylor 262

(p) Treaty of Versailles, 1919 Art 276 Treaty of St Germain 1920 Art 250

(q) *Secus* if the injury arose out of acts of legitimate warfare see Wharton, Dig II 582

having regard to the standards of an average well-ordered community and the existing local conditions (r) On this principle every State is bound to provide reasonable means for preventing injury to other States and their subjects, including an honest judiciary and an adequate police These may vary according to local conditions and the character of the national institutions, but they must not fall short of such means as may be considered essential to an average well-ordered community (4) At the same time a State is not bound to provide absolute protection; and to establish a case of international responsibility there must be some proof of international delinquency, in the shape of a failure on the part of the territorial Power to fulfil the obligations already indicated (s)

Possible Cases of Injury.—In a case where the injury arises from some wrongful act or omission on the part of its officials, the local Power will be deemed responsible, unless such acts are disavowed and adequate reparation made In a case where the injury arises out of a wrong alleged to have been sustained by the defective administration of justice, a State will not, of course, incur any liability for decisions that are merely erroneous, but a State will be internationally responsible if it can be shown that the law unjustly discriminates against aliens, or that the ordinary administration of justice has been manifestly perverted or distorted to the detriment of some particular individual, without hope of judicial redress (t) In a case where the injury arises out of the acts of private persons in order to establish any international delinquency it must be shown either that the local Power could by reasonable diligence have prevented the outrage complained of, or, if this was impracticable, then that it failed to exercise reasonable diligence in prosecuting the offenders and in affording such other reparation as was warranted by the local law, or finally, that the law was so defective or the Courts so corrupt as virtually to afford no adequate protection to foreigners within its limits (u) Nor, in general, can defects of the local constitution or of the existing municipal law be set up as an excuse for the non fulfilment of international obligations of the character previously described This question was raised both in *Cutting's Case* and virtually also in the Newfoundland fishery dispute between Great Britain and the United States A general answer is attempted at p 245, *infra* It arose again in 1907, when complaint was made by Japan to the United States Government with respect to the treatment of its subjects in California, and the unjust discrimination against them shown in their exclusion from the

(r) Hall, 269, 272, 331

(s) Taylor, 259 For a short account of the abduction of Miss Stone, an American, by Turkish brigands, in 1902, and the issues involved, see the *Law Magazine and Review*, May, 1902.

(t) Taylor, 260, Hall, 272

(u) For the New Orleans lynching of Italians in 1891, see Scott, p 104, and Wharton, Dig 1 pp 473 *et seq*, and II, p 600 For the *Cadenhead Case*, see Amer J I L, vol VIII, 663-5.

local schools; this being really a matter for the State Legislature, which the federal authorities appeared to have no power to remedy. In the result, however, and at the request of the federal authorities, the offending regulations were withdrawn.

DOMICIL

THE "INDIAN CHIEF"

(1800), 3 C. Rob. 12.

IN 1795, during war between Great Britain and Holland, the "Indian Chief", a vessel belonging to one Johnson, but sailing as an American ship with American papers, proceeded on a voyage from London to Madeira, and thence to Madras, Tranquebar and Batavia. In 1797, on the return voyage with a cargo shipped at Batavia, the master put into an English port for orders; whereupon the vessel was arrested, on the ground that she was the property of a British subject and had been engaged in an illegal trade with the enemy. It appeared that Johnson had been born in America before the War of Independence; that on the outbreak of hostilities he went to France; and that in 1783 he came to England, and was resident and engaged in trade in that country until 1797. It appeared, however, that in 1797, before the arrest of the vessel, he had left England and returned to the United States. It was held that although between 1783 and 1797 he must undoubtedly be taken to have acquired an English domicil, and to have been subject to English municipal law, yet that on his return to the United States in 1797 his American character must be deemed to have reverted; and that the vessel was not therefore liable to condemnation. In the same case a question also arose as to the nationality and consequent liability of the owner of the cargo. This belonged to one Millar, who was engaged in trade in Calcutta, but also acted as American consul at that place. After some discussion as to the nature of the British authority in India, it was held, in effect, that as the credentials of consuls there were addressed to the British Government, Millar must be regarded, in view of the fact that he resided and carried on trade in British territory, as

a British merchant, and that the cargo belonging to him, having been taken in trade with the enemy, was subject to confiscation.

Judgment.] Sir W. Scott (afterwards Lord Stowell), in giving judgment, stated that although the vessel sailed as an American ship and with American papers, yet if the owner really resided in England and the voyage were such as an English merchant could not engage in, then the fact of his being an American citizen, and the fact of his furnishing the ship with American papers, would not protect the vessel, for the reason that liability depended on the actual character of the owner. On a review of the facts, the learned Judge held that Johnson must be regarded as an American by birth, as having been adopted as an American subject by the Act of the American Government, and as retaining the benefit of his native American character. Nevertheless, between 1783 and 1797, during which time he resided in England and engaged in trade there, he was undoubtedly to be considered as an English trader; for no position was better established than this—that “if a person goes to another country and engages in trade and resides there, he is by the law of nations to be considered as a merchant of that country”. If Johnson had continued to reside in England, the transaction would have been considered as a British transaction, and therefore as a criminal transaction, on the common principle that it is illegal in any person owing an allegiance, even though temporary, to trade with the enemy. But there was evidence that Johnson had for some time formed an intention of leaving England, which had been prevented by various obstacles; and it was clearly shown that in September, 1797, he did actually return to America, and that this occurred some weeks before the arrest of the vessel. Inasmuch as the character of Johnson as a British merchant was only acquired by residence, and founded on residence, it must be held that from the moment he turned his back on the country where he resided, on his way to his own country, he resumed his original character, and was to be considered as an American. The character gained by residence was an adventitious character, which no longer attached from the moment he put himself in motion, *bona fide*, to quit the country, *sine animo revertendi*.

This case serves to illustrate the nature of what is sometimes called "commercial domicil" (a), although it may perhaps be doubted whether there is any substantial distinction between this and the "civil domicil" referred to hereafter. Commercial domicil denotes a settled residence in a particular country for the purposes of trade by virtue of which a person even though politically a member of another State, is deemed to be so far identified with the country in which he resides and trades as to share its national character, whether as belligerent or neutral, in time of war. So from the point of view of the British Courts and of those of the United States and Japan, if, in time of war, a person, whatever his national character, is found to be domiciled in the territory of one belligerent, his ships and property on the sea will be deemed to be liable to capture by the other (b). Moreover, if his domicil is British he will be debarred from engaging in trade with the enemy, under pain of forfeiting the property involved (c). Finally, if domiciled in the enemy territory, he will also be debarred from suing in British Courts during the continuance of the war (d). But inasmuch as these consequences are founded only on residence, they will cease to apply so soon as such residence has been brought to an end *bona fide* and *sine animo revertendi*, more especially in a case where the withdrawal is to the country of origin. Domicil, however, is also important for another purpose. Permanent residence in a particular country, accompanied by intent to remain is regarded by the British Courts, as well as by the Courts of the United States and certain other countries as determining the personal law by which a man's civil rights and liabilities are for the most part governed—as the criterion, in fact, of his civil status. This form of domicil we may perhaps call "civil domicil". This frequently coincides with "commercial domicil", but the distinction which is commonly drawn between the two is that whilst "civil domicil" is founded on actual or presumed residence in a country for the purpose of making it one's home, commercial domicil is founded on residence for the purposes of trade. Commercial domicil, in fact is said to imply some relation in the nature of a trade establishment, sufficient to identify the trader with the country, and of a kind calculated to contribute to its resources, but not necessarily a permanent or indefinite relation such as that involved in civil domicil. But really it would seem that both these forms of domicil involve a similar relation to the country of residence, and that both are governed by similar principles (e) and attended by similar consequences in a case where the facts admit of their application. In each case there must be residence with intent to continue, although

(a) Dicey Conflict of Laws (1896), p 735 *et seq*

(b) *The Harmony* 2 C Rob 322, *The Venus*, 8 Cranch 253

(c) *The Indian Chief*, *supra*

(d) *Albriecht v Sussmann*, 2 Ves & B 323

(e) Prize cases, such as *The Indian Chief* are cited in civil right cases and *vice versa*. It is sometimes said that they differ in the greater facility with which commercial domicil may be relinquished but even this appears to be only a difference in the mode of proof

in one case this is looked to for the purpose of ascertaining civil status and in the other for ascertaining liability in war, especially as regards commercial property. A fixed residence with intent to remain, whether for the purposes of a home or for trade, will equally confer a civil status, and an enemy character in time of war, and it would seem that nothing short of fixed residence will suffice in either case (f)

Political and Civil Status.—The law of nearly every country attributes to every individual two kinds of status (1) a political status, in virtue of which he becomes a citizen or subject of some particular State, to which he owes allegiance and to which he may look for protection, and (2) a civil status, in virtue of which he becomes invested with certain rights and duties, capacities and incapacities, within the domain of private law. It is by the law governing this civil status that questions of civil capacity, including capacity to marry, and even to enter into other contracts, capacity to alienate movables, capacity to make a will of movables, and the succession to movables, including both tangible things and *choses in action*, are for the most part determined. And the rights and duties, capacities and incapacities, which so accrue will, in general, be recognised by the Courts of other civilised States (g)

How Civil Status is determined.—From the point of view of British and American Courts, the question of civil status is determined by the principle of domicil. That is, a man's civil status will be deemed to depend on the law of the country in which he is, or is presumed to be, permanently resident. From this point of view it will frequently happen that both the political and civil status of a given individual will be referable to the law of one and the same country. So, a person born in France of French parents and permanently resident there, will possess both the political and civil status of a Frenchman. But they may, on the other hand, be referable to different laws. So, a person who was by birth a natural born British subject may become permanently resident in France, although without becoming naturalised there, in which case he will retain his political status as a British subject, whilst his civil status will be governed by the law of France, as being the law of his domicil (h). In *King v Locuelli* L R 3 Ch D 518, it was held that a natural born British subject who had emigrated to the United States, and had been naturalised there, neverthe-

(f) As to trading without domicil, see p 232, *supra*. For a discussion of this question see two articles by T. Baty and Westlake, J S C L (N S) xix p 157, and xv p 265. See also *Janson v Driefontein*, [1902] A C, at p 505, and *Nigel & M Co v Hoade*, 17 T L R 711.

(g) Although not universally, see *Lynch v Paraguay*, L R 2 P & D 268, *Worms v De Valdor*, 49 L J Ch 261.

(h) *Udny v Udny*, L R 1 Sc App 441.

less recovered his English domicil and its attendant status on returning to England with intent to remain, even though he retained the political status of a citizen of the United States. The same State, moreover, may comprise within its territory several countries, each of which possesses its own system of private law; and in such a case each such country will be regarded as a separate entity or unit for the purpose of determining civil status. So, a person domiciled in England, Scotland, or a British possession, will be deemed to possess a civil status which will be governed by the private law of that particular part of the British dominions in which he resides. The rule that civil status is determined by domicil is also adopted by other municipal systems, such as those of Denmark, Norway, and Austria. On the other hand, in other countries, such as France, Germany, and Italy, the question of civil no less than political status appears to be determined by the principle of nationality, or by the law of the State to which the individual in question owes allegiance as a subject or citizen (*i*). Of these two principles, that of domicil appears to be the more convenient; for the reasons (1) that it is more dependent on external facts, and hence more easy of ascertainment than nationality; (2) that it makes a man's civil status and personal law more dependent on his own will; and (3) that for the purposes of private law, and in the domain of civil right, it treats citizen and alien as being on an equal footing (*k*). "Nationality", moreover, is altogether inapplicable as a criterion of civil status in the case of countries such as England, Scotland, and Ireland, which, whilst possessing separate systems of private law and judicature, are yet nationally parts of one and the same State (*l*).

Civil Domicil: (*i*) *How acquired*.—Domicil has been defined as a man's principal place of residence; *ubi quis larem rerum ac fortunarum suam summam constituit*. It is, in fact, the place where a man has or is presumed to have his home, and which is therefore the centre of his jural relations. It is said to depend, and does in most cases actually depend, on a combination of fact and intention; on the physical fact of a man's fixing his residence at a particular place, and on his mental purpose to remain there permanently or for an indefinite time. Every man is presumed to have some domicil. At his birth he inherits the domicil of the father if he is legitimate, or that of the mother if he is illegitimate. This is called the "domicil of origin"; and is frequently, although not necessarily, identified with the country from which a person derives his national character. Thereafter, and until he becomes *sui juris*, his domicil continues dependent on that of his father; or, if the father be dead, then primarily on that of his mother; whilst if both parents are dead, he should, it is conceived, be regarded as retaining the domicil which belonged to his father at the

(*i*) Dicey, *Conflict of Laws*, 81 *n.*; and *L. Q. R.* April, 1908, p. 133.

(*k*) See Meili, 116 and 123.

(*l*) For an example, see *Re Johnson*, [1903] 1 Ch. 821.

time of death (*m*). When a person becomes *sui juris*, it will be competent to him to choose another domicile; a domicile so acquired being termed a "domicil of choice". For this it is necessary that he should abandon his former domicile, and take up his residence in a new country, with intent to remain there for an unlimited time. With respect to the evidence necessary to establish a new domicile, Courts of justice must necessarily draw their own conclusions from the circumstances of each particular case (*n*). The two essential factors are residence and intention. More will depend on the nature and character of the residence than on its length. If the intention is manifest, the duration of residence is comparatively unimportant; but in other or doubtful cases time will be regarded as an important factor in determining domicile (*o*).

(ii) *How lost*.—A domicile of origin may be extinguished by act of law, as by a sentence of perpetual exile. The acquisition of a new domicile of choice, however, will not extinguish but will merely suspend the domicile of origin: which will accordingly revert, if the domicile of choice should be abandoned without a new domicile being acquired (*p*). Domicile of choice, on the other hand, as it is gained *animo et facto*, must in like fashion be terminated *animo et facto*; and to constitute an abandonment there must be an actual cessation of residence, coupled with an intention to abandon; neither being sufficient without the other (*q*).

Domicil in Public International Law.—With the question of civil status public international law is not strictly concerned, save in so far as may be necessary to mark clearly the distinction between that and political status. Nevertheless domicile possesses a certain importance even in the domain of external relations. In the first place, as has already been pointed out, the nationals of one State, if resident within the territory of another, are the objects of certain international requirements as regards their treatment; and these requirements apply equally to domiciled aliens, although, in view of the fixed relation which domicile involves, the intervention of the parent State is sometimes less readily conceded (*r*). In the second place, according to the view entertained by some States, enemy character in time of war is determined mainly, although not exclusively, by "domicil"; and even though other States adopt "nationality" as the criterion for determining the liability of property to maritime capture, yet all alike

(*m*) Although this is not settled: see Dicey, *Conflict of Laws*, 104 (5th ed., 1932).

(*n*) As to the legal presumptions with respect to domicile, see Dicey, *Conflict of Laws*, 113.

(*o*) *The Harmony*, 2 C. Rob. 322; and Nelson, *Cases in Private International Law*, 15-33.

(*p*) See *The Indian Chief*, *supra*; *Udny v. Udny*, L. R. 1 Sc. App. 441; and *Bell v. Kennedy*, L. R. 1 Sc. App. 307.

(*q*) *In the Goods of Raffenet*, 32 L. J. P. & M. 203; and *Re Steer*, 28 L. J. Ex. 22.

(*r*) Hall, 335.

recognise residence, and *a fortiori* domicile, as determining liability to the incidents of land warfare (s). Finally, as we have seen, domicile, as distinct from nationality, has occasionally been put forward as conferring on a State a right of protection over persons domiciled within its territory, when personally present in other States; although it is conceived that, in the present state of international usage, such a right cannot justly be asserted as against the State of origin. In general, however, and subject to the exceptions previously mentioned, it would seem that domicile must be limited in its effects to matters of civil status.

So, in *Ah Yin v. Christie*, 4 C. L. R. 1428, it was held that an admitted domicile on the part of an alien father could not confer a right of entry, in derogation of the local immigration law, on an infant child who was resident in a foreign country; for the reason that domicile was confined to the determination of questions of civil status (t).

CRIMINAL JURISDICTION

(i) TERRITORIAL

MACLEOD v. ATTORNEY-GENERAL FOR NEW SOUTH WALES

60 L. J. P. C. 55; [1891] A. C. 455.

IN 1872 the appellant was married in New South Wales to one Mary Manson. In 1889, and during the lifetime of Mary Manson, he was married in the United States of America to one Mary Elizabeth Cameron. He was subsequently arrested in New South Wales, and indicted for bigamy under section 54 of the Criminal Law Amendment Act, 1883, a statute passed by the local Legislature. That section was in the following words: "Whosoever, being married, marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for ten years". On this indictment the appellant was convicted at a Court of Quarter Sessions, and his conviction was subsequently affirmed by the Supreme Court. On appeal, by special leave, to the Privy Council, however, this judgment was reversed and the

(s) This subject is discussed more fully in vol. ii. *sub nom.* "Enemy Character in Time of War".

(t) In *The Countess of Conway's Case*, 2 Knapp, at p. 367, however, some observations made by Baron Parke suggest that domicile may be a good foundation for a claim made in the character of British subject.

conviction set aside on the ground that the provisions of the local statute must be regarded as having been intended to apply only to offences committed by persons within the territory of the Legislature by which it was passed.

Judgment.] In the judgment of the Judicial Committee, which was delivered by Lord Halsbury, L.C., it was pointed out that the word "whosoever" in the section would, if accepted in its ordinary meaning, cover all persons all over the world, natives of whatever country; whilst the word "wheresoever" was equally universal in its application. Hence, if they were to construe the statute as it stood, any person married to any other person, who married a second time anywhere in the habitable globe, would be amenable to the criminal jurisdiction of New South Wales, if found in that colony. But that was an impossible construction, and they could not attribute to the Colonial Legislature an effort to enlarge its jurisdiction to an extent inconsistent not only with the powers committed to a colony but also with the most familiar principles of international law. Hence it must be taken that "whosoever being married" meant "whosoever being married, and who was amenable at the time of the offence committed to the jurisdiction of the colony"; whilst "wheresoever" might well—in view of the fact that there were in the colony subordinate jurisdictions, some of them extending over the whole colony, others confined within local limits of venue—be taken to mean "wheresoever in this colony the offence is committed". Upon the face of the record the offence was charged to have been committed in Missouri, in the United States of America; hence the offence charged was manifestly beyond the jurisdiction of the colony of New South Wales; and the conviction must therefore be set aside.

If the wider construction were applied, it would clearly have been beyond the powers of the colony to enact such a law. Their jurisdiction was confined within their own territories, and the maxim *Extra territorium jus dicenti impune non paretur* would be applicable. Lord Wensleydale, in advising the House of Lords in *Jefferys v. Boosey*, 4 H. L. C., at p. 926, expressed the same proposition tersely when he said: "The Legislature has no power over any persons except its own subjects—that is, persons natural-born subjects, or residents whilst they are within the limits of the kingdom. The Legislature can impose no duties

except on them, and when legislating for the benefit of persons must, *prima facie*, be considered to mean the benefit of those who owe obedience to our laws". All crime was really local; the jurisdiction over it belonged only to the country where the crime was committed; and except over its own subjects even the imperial Legislature had no power whatever (*u*).

In cases of crime the question of the applicability of the law of a State and the question of the jurisdiction of its Courts are substantially identical; for the reason that the Courts of one State will not aid in the enforcement of the criminal or penal law of another State (*a*). The decision in *Macleod v. The Att.-Gen. of New South Wales* serves to illustrate the principle that, both by the English law—except where otherwise provided by Act of Parliament—and by the law of nations, the criminal law and jurisdiction of a State are primarily territorial; or, in other words, that the application of its law and the exercise of jurisdiction on the part of its Courts are primarily restricted to crimes committed within its territorial limits.

By the common law of England all crime is local in its character, and both the application of the criminal law and the exercise of a criminal jurisdiction, except in cases of piracy, are confined to offences committed on land in England or in land-locked waters forming part of an English county (*b*). But the Admiralty has from time immemorial claimed jurisdiction over all crimes committed on board British ships, whether by subjects or foreigners, on the "high seas"—including in that term all waters where great ships go and lie afloat; and this jurisdiction has now been transferred to and is exercisable by the ordinary criminal Courts.

The doctrine, moreover, that criminal law and jurisdiction are territorial applies not only in England, but also in other parts of the British dominions; in some cases as a principle inherited from English law, and in all cases as a principle which restricts the scope of local legislation in deference to the requirements of international law. It is true that this restriction may be relaxed by imperial statute, but, in default of such authority, it is not competent to a local Legislature

(*u*) No reference appears to have been made to an imperial statute, 9 Geo. 4, c. 31, which was apparently applicable to New South Wales by virtue of 9 Geo. 4, c. 83, s. 24, and which made it felony for a British subject to contract a bigamous marriage in England or elsewhere. In the subsequent case of *R. v. Hilaire*, 3 S. R. N. S. W. 228, however, it was held by the Supreme Court of New South Wales that, notwithstanding this statute, the Courts of the State had no jurisdiction to try such a case where the second marriage had been contracted outside N. S. W. Cf. *Earl Russell's Case*, *infra*, p. 240.

(*a*) *Folliott v. Ogden*, 1 H. Bl. 123.

(*b*) *R. v. Keyn*, 2 Exch. D. 63; *R. v. Cunningham*, Bell, C. C. 72.

to give its criminal law an extra territorial application or to confer on its Courts an extra-territorial jurisdiction, derogating from the principles of international law. It is, however, competent to Parliament as the supreme law-making body, to extend both the scope of the criminal law and the jurisdiction of the Courts, whether of the United Kingdom or of other parts of the British dominions, to crimes committed outside the territorial limits, and if it clearly manifests such an intention, this will be given effect to by all British tribunals, although the jurisdiction as thus extended would not be recognised externally. Such an extra-territorial jurisdiction has in fact been bestowed by Parliament in a large number of instances. The British Dominions can also enact legislation having extra territorial operation. It is equally competent to Parliament to confer on a subordinate Legislature, such as that of a British colony, a power to give its laws an extra territorial application and to bestow on its Courts an extra-territorial jurisdiction, and Parliament has in fact done this in certain instances, and as regards certain kinds of offences (c).

The risk of allowing criminals who offend in one country but escape to another to go unpunished which might otherwise arise from the doctrine that criminal law and jurisdiction can only be applied in the country where the offence was committed, is for the most part avoided by a system of extradition, established as between the various parts of the British dominions by the Fugitive Offenders Act, 1881, and, as between the British dominions and foreign countries, by a series of treaties made under the Extradition Acts, 1870-1932. Greater readiness is shown today than was formerly the case to assist in the enforcement of the criminal law of foreign States where the nature of the act done is generally recognised as criminal.

The question of criminal jurisdiction arises internationally mainly, although not exclusively, in cases of extradition. In such cases the view adopted by the English and American Courts appears to be that, inasmuch as the territoriality of criminal jurisdiction is a principle of international law, no claim for extradition can be validly preferred except by a State within whose territory the offence was committed.

So, in *The Queen v Ganz*, 9 Q B D 93, where the prisoner, who was by birth an Austrian subject, but by naturalisation a citizen of the United States, was charged with an offence committed in Holland, it was held that he was amenable, not to the law of Austria or of any other country, but to the law of the State where the offence was committed, and that he was therefore extraditable, under the extradition treaty between Great Britain and Holland. "By the law of nations", it was said, "each person who is within the jurisdiction of the particular country in which he commits a crime is subject to that jurisdiction, otherwise the criminal law could not be administered according to a civilised method. This has been the law from very far back, it is recognised

(c) See, by way of an example, 63 & 64 Vict. c. 12, ss. 5, 51 (10) and (29), 12 & 13 Vict. c. 96, 23 & 24 Vict. c. 122; and 53 & 54 Vict. c. 27.

by the earliest writers it has been adopted again and again in treaties . . . and it is found to be stated in all the text books on the subject, and in all the cases in which the matter has been discussed.

In 1873 *Carl Vogt*, a German subject, was accused of robbery and murder in Belgium, and escaped to the United States. There was at the time an extradition treaty with Germany, but none with Belgium. The extradition of the offender was sought by both countries—by Germany on the ground that Vogt was personally amenable to the German criminal law, and by Belgium by reason of the offence having been committed in Belgian territory, but the application of Germany was refused on the ground that the crime was not (according to the law of nations) committed within the German jurisdiction or governed by German law whilst that of Belgium was refused on the ground of there being no treaty. (d)

Again in *The Attorney General of Hong Kong v. Kuok a Sing*, L. R. 5 P. C. 179 where a Chinese who had taken refuge in Hong Kong, was accused of having murdered the captain of a French ship, on the sea, it was held that he could not be delivered up to China, under an ordinance of Hong Kong which authorised the delivery up of any Chinese who was reasonably suspected of having committed an offence against the laws of China, both because it could not be assumed that there was any law of China punishing the murder of a foreigner on foreign territory, and because, even if it could be so assumed, still the offence having been committed on what was equivalent to French territory, must be treated as an offence against French and not against Chinese law.

The question of criminal jurisdiction may also arise internationally where a subject or citizen of one State is proceeded against in the Courts of another State in respect of an offence alleged to have been committed outside the territory of the latter. This question however, will be discussed hereafter. (e)

(11) EXTRA-TERRITORIAL, IN RELATION TO NATIONALS

EARL RUSSELL'S CASE

70 L. J. K. B. 998 [1901] A. C. 446

EARL RUSSELL, a British subject and a peer of the realm, was in 1890 married in England to one Mabel Edith Scott. In 1900 he obtained an order of divorce from the Courts of Nevada, in the United States of America. Such divorce was, however, defective from the point of view of English law, by reason of the accused not having been domiciled there. In the same year, and in the same State, he went through the ceremony of marriage

(d) See Wharton (Boyd), p. 183 and as to the United States practice with respect to extradition Wharton Digest pp. 714 *et seq.*

(e) See *Cutting's Case*, *infra*

with one Mollie Cook. Thereupon the prisoner's wife, Mabel Edith, obtained a divorce in England on the ground of bigamous adultery. The prisoner was subsequently arrested in England; and a true bill having been found by the grand jury, this fact was communicated by the Recorder to the House of Lords; arrangements were then made for the trial of the accused before his peers; and a commission was issued to Lord Halsbury, L.C., to preside at the trial as Lord High Steward. The indictment having been removed into the House of Lords by writ of *certiorari*, the accused was thereupon arraigned before the House; 160 peers, including the Law Lords who usually hear appeals, being present, together with eleven of the Judges. The prisoner was charged under the Offences against the Person Act, 1861, section 57 of which provides that "whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony". It was sought to quash the indictment on the ground that the statute did not in express terms apply to any offence committed beyond the King's dominions; and that the term "elsewhere" meant elsewhere within the King's dominions. In aid of this contention, it was pointed out that criminal jurisdiction extended generally only to offences within the territory, and that if it was to extend outside, then express words must be added; also, that in dealing with homicide, which is clearly triable even though committed outside the territory, the same statute added the words, "whether within the Queen's dominions or without". Reference was also made to *Macleod v. Att.-Gen. of N.S.W.*, [1891] A. C. 455. In the result the prisoner was convicted and sentenced to six months' imprisonment.

Judgment.] In the judgment, which was delivered by Lord Halsbury, it was held that section 57 extended to marriages contracted by British subjects in any part of the world.

This case, which possesses a certain constitutional interest as regards the procedure involved, serves to illustrate that personal jurisdiction which is claimed by most States, although in varying degrees, over their citizens or subjects with respect to certain offences committed outside their territorial limits. This jurisdiction is independent of place,

and rests commonly on the national character of the persons over whom it is exercised, although sometimes extended to foreigners. So, in the present case, the accused, being a British subject, was on his return within the jurisdiction held amenable to a law made by Parliament, which extended to offences committed in a foreign State. The difference between this case and that of *Macleod v. Att.-Gen. of N. S. W.* lay in the fact that whilst the imperial Parliament can confer such an extra-territorial jurisdiction, a colonial Legislature can not do so except under the authority of an imperial Act. With respect to the English law, the common law principle that both the application of the criminal law and the exercise of criminal jurisdiction are confined to offences committed in England has now been greatly qualified by statute; with the result that a criminal jurisdiction has now been conferred in a large number of cases over offences committed by subjects—and in some cases over offences committed by foreigners—outside the limits of the United Kingdom, or even outside the dominions of the Crown. But such extended jurisdiction cannot strictly be made the foundation of any international right. It can be exercised, moreover, only where the offender is at the time of arrangement personally present within the jurisdiction. In some cases this extra-territorial jurisdiction is confined as to its exercise to the Courts of the United Kingdom; in other cases it either extends or is made extensible to the Courts of other British possessions. In some cases, again, it is exercisable only over British subjects; in other cases it extends even to foreigners, although usually only in virtue of some special connection, such as service within three months on board a British vessel. The more important cases in which extra-territorial criminal jurisdiction has been conferred by statute are: (1) treason, although in this case the seat of the offence would seem to be really local (*f*); (2) murder or manslaughter committed by British subjects on land outside the United Kingdom (*g*); (3) bigamy committed by British subjects anywhere (*h*), for the purposes of trial in the United Kingdom; (4) offences committed in territorial waters (*i*); (5) offences within s. 4 of the Foreign Enlistment Act, 1870, committed by British subjects anywhere (*k*); (6) offences under the Slave Trading Act, 1824, if committed by British subjects or any person resident within the British dominions (*l*); (7) offences committed out of the British dominions by any seaman who at the time of the offence or within three months previously has served on board a British vessel (*m*); (8) offences committed by British subjects in

(*f*) 25 Edw. 3, st. 5, c. 2; 35 Hen. 8, c. 2, and *R. v. Casement*, [1917] 1 K. B. 98.

(*g*) 24 & 25 Vict. c. 100, s. 9.

(*h*) *Ibid.* s. 57.

(*i*) 41 & 42 Vict. c. 73; although this, again, is not strictly an exception.

(*k*) 33 & 34 Vict. c. 90, s. 4.

(*l*) 5 Geo. 4, c. 113, ss. 9 and 10.

(*m*) Merchant Shipping Act, 1894, s. 687. As to what amounts to service, see *R. v. De Mattos*, 7 C. & P. 458.

countries without regular government, and coming within the terms of the Foreign Jurisdiction Act, 1890, and the Orders in Council passed thereunder (n); as well as in certain other cases of minor importance.

(iii) EXTRA-TERRITORIAL; IN RELATION TO
FOREIGNERS

CUTTING'S CASE

[1896; Wharton, *Digest*, i. pp. 48-49; ii. pp. 439-442; Moore, *Digest*, ii. § 201.]

IN 1886, Mr. Cutting, an American citizen, who for some time previously had been a resident "off and on" at Paso del Norte, in Mexico, published in a newspaper circulating at El Paso, in Texas, in the United States of America, a libel reflecting on the character of one Medina, a Mexican citizen, with whom he had been in controversy. Thereupon criminal proceedings were instituted in the Mexican Courts, with the result that Mr. Cutting, on being found some time afterwards in Mexican territory, was arrested and imprisoned, and subjected to other injurious treatment by the local authorities. These proceedings were based on certain provisions of the Mexican Penal Code, Art. 186, which purported to give the local Courts jurisdiction over offences against Mexican citizens, even when committed within the territory of a foreign country.

Controversy.] On the facts becoming known, the United States Minister was instructed to demand the immediate release of Mr. Cutting. In a despatch relating to the arrest, Mr. Bayard, the Secretary of State, pointed out that the newspaper containing the libel complained of had not been published in Mexico; and that the proposition that Mexico could assume jurisdiction over the author by reason of a publication made in the United States was wholly inadmissible. Otherwise Mexico would be entitled to assume jurisdiction over the authors of any criticisms on Mexican business operations which might appear in newspapers

(n) See the Foreign Jurisdiction Act, 1890, s. 2, and the Order in Council of May 9, 1891.

published in the United States, in the event of such persons coming within Mexican territory. Such an assumption of jurisdiction would not be tolerated either by the Federal or the State Government. Each of these Governments would itself mete out justice for wrongs done within its own jurisdiction, but none would permit its prerogative in this respect to be usurped by Mexico, or permit a citizen of the United States to be called to account elsewhere for acts done in the United States. There was, moreover, another ground on which demand for release might be based. By the law of nations, no punishment could be inflicted on a citizen of another country unless in conformity with those sanctions of justice which all civilised nations held in common. These included the right of having the facts on which the accusation was based inquired into by an impartial Court; a due explanation of these facts to the accused; the opportunity of having counsel; sufficient delay to enable the accused to prepare his defence; permission in cases not capital to go at large on bail till trial; the production on oath of evidence in support of the charge, with the right to cross-examine and to adduce evidence in reply; and release even from temporary imprisonment where the charge was merely of a threatened breach of the peace, and due security was tendered. But in the present case all these sanctions were violated. In reply, the Mexican Government appears to have relied on the fact that Mr. Cutting's offence was one punishable under the local law; and that the national Government had no power to interfere with the ordinary course of law (o). In the result, however, Mr. Cutting was released; the Mexican Government having apparently induced the prosecutor to withdraw from the case (p).

Some States claim to apply their criminal law and to exercise a criminal jurisdiction in the case of offences committed outside their territorial limits not only by subjects, but also by foreigners. The present case serves to illustrate at once the nature of, and the risks incident to, such a practice. The position taken up by the United States was that the claim put forward by Mexico to take cognisance of an offence committed in the United States by a United States citizen,

(o) Wharton, ii. 441.

(p) Westlake, i. 252.

even though it affected a Mexican citizen, and even though the alleged offender might subsequently be apprehended in Mexico was bad in principle as involving a violation of the right of every State to exercise exclusive sovereignty and jurisdiction as to all persons and things within its own territory, that it was not warranted by the accepted custom of nations, and, finally, that it was in the highest degree inconvenient and dangerous. These contentions appear to be in substance correct. Such a claim goes beyond that exceptional jurisdiction which is frequently claimed and exercised by States over their own subjects, for the reason that the latter jurisdiction is only exercisable when the citizen or subject has returned to his native land and to his natural allegiance and when, consequently, no other State has any right or interest in protecting him against his personal law. Even in such a case, however, if the person proceeded against were domiciled in some other State, the claim to exercise jurisdiction over him might conceivably be impugned unless the offence charged was one affecting his allegiance to his native country, or unless the seat of the offence was really local.

Incidentally two other questions arose. (1) Is one State justified in intervening for the purpose of ensuring fair treatment for its nationals when arraigned before the Courts of another State? On this point the contention of the United States was that an alien when arraigned before the Courts of the State in which he happens to be present, is entitled to certain rights which are recognised by the common assent of civilised States as necessary incidents to the administration of justice, including an impartial tribunal, knowledge of the charge, reasonable facilities for defence, due proof and opportunity for disproof of the offence, and release on bail in an appropriate case, and that his State is entitled to intervene for the purpose of vindicating this right. This contention appears to accord with the principles previously suggested, that any State is entitled to intervene in a case where its nationals are concerned if justice is denied, or perverted, or the treatment meted out to them is such as does not comply with standards prevalent in an ordinary civilised community (1). (2) What is the position of a State as regards international delinquencies which the national constitution or the local law either permit or do not enable it to remedy? To this question no answer was given in *Cutting's Case*, but in general the answer would appear to be that defects in the local constitution or local law cannot be accepted as an excuse for the non-fulfilment of international duties (2), and that as regards breaches that have already occurred, an adequate indemnity must in any case be made, although existing defects may perhaps be urged in mitigation of delay or default in visiting with punishment particular offenders.

(1) Wharton, Dig. 1, 19.

(2) See the case of *The Alabama* and the Award of the Geneva Tribunal *infra*, vol. II.

With respect to the possible recurrence of such delinquencies, although a State cannot be required to alter its national polity in deference to possible injuries to other States or their subjects, yet it is bound to make such provision for fulfilling its international obligations as is consistent with the character of the national institutions; and also to ensure that such provision shall not be glaringly defective in safeguarding the fundamental rights of other States and their subjects (t).

The Question of Jurisdiction and Law generally.—Where a case involving a foreign element, whether in relation to persons, things, or occurrences, presents itself for determination before the Courts of any particular State two questions will arise: (1) whether the Court has, in the circumstances, a right to try and to pronounce judgment in the case—this being a question of jurisdiction; and, if this should be answered in the affirmative, then (2) what law should be applied to its decision—this being a question of the application of law. The question, it should be observed, is here not one of competency as between Courts of the same judicial system, or of the selection of the rule properly applicable under the domestic code, but one of international competency as between the Courts, and of selecting the appropriate law as between the laws, of different States that might otherwise claim to be seised of the matter. From an international standpoint each State is supposed to confine the operation of its laws and the action of its Courts within certain generally accepted limits. It is, of course, competent to any State to extend these limits by positive enactment, and such an extension either of its jurisdiction or of its law will necessarily be given effect to by its own Courts so far as their powers extend. But in so far as it transcends the international limit, it will not, in general, be recognised externally, or be given effect to by the Courts of other States; whilst if it should affect prejudicially the subjects of other States, then this may conceivably provoke remonstrance or intervention.

Jurisdiction and Law primarily Territorial.—Every State is deemed to possess an exclusive power of making law and an exclusive right of jurisdiction within its own territory (u). This principle, which lies at the very root of sovereignty, has both a positive and negative aspect. On its positive side it means that the laws and jurisdiction of a State will be deemed to extend to all persons and things found, and, as regards acts, to all acts done, within its territory, including in this

(t) Hall, 272; and for an account of *Rahming's Case*, *ibid.* 322; Moore ii. § 201; Calvo VI. §§ 171-3; Westlake i. 252.

(u) For recognition of this, see arts. 24, 25, 60, and 76 of the Peace Convention, 1907.

term its ports and territorial waters, as well as on its public vessels everywhere and its private vessels on the high seas. On its negative side, it means that one State cannot by its laws or by any exercise of jurisdiction on the part of its Courts bind directly persons or things found, or take cognisance of acts done, within the territory of any other State. But this principle is subject to a number of exceptions, both on its positive and negative side.

Exceptions to Territorial Principle.—The more important exceptions to the territorial principle may, for our present purposes, be grouped under three categories. (1) By the common usage of nations, and in accordance with the doctrine of extritoriality, certain persons and things found in the territory of one State are withdrawn from the jurisdiction and from the operation of the laws of the territorial Power, and relegated to those of the Power to which they belong. The subjects and limits of this group of exceptions will be considered hereafter. (2) Nearly all States, more over, claim within certain limits, which vary greatly in different systems, to make their territorial law binding on their subjects even when outside their own territory or within the territory of some other State, and to exercise all consequent jurisdiction in as far as this can be done without violating the sovereignty of the territorial Power, whilst some States, as we have seen, claim to extend their law and jurisdiction even to acts done by foreigners, and within the territory of a foreign State. Such a jurisdiction, however, has, it would seem, no international sanction, and depends for its efficacy on the law of the State by which it purports to be assumed. And, although one State will not generally interfere with another State in so far as the latter applies its domestic law to, or exercises jurisdiction over, persons who are its subjects and within its control, yet other States will not in general lend any aid to the exercise of such a jurisdiction—*e.g.*, by a grant of extradition, nor will it be recognised or given effect to by the Courts of other States. If exercised over foreigners, moreover, it may, as we have seen in *Cutting's Case* provoke intervention on the part of States whose subjects are affected. The extent of this extra-territorial jurisdiction and operation of law varies in each particular municipal system. Its extent in English law in cases of crime has already been touched on, whilst its extent in civil cases will be considered hereafter. (3) Finally, it is necessary to mark and distinguish another class of cases, purely civil in their character, in which either an extra-territorial jurisdiction or an extra-territorial application of law is exercised or conceded by virtue of a body of principles which are recognised and followed by the Courts of all civilised States, and which constitute indeed in civil matters a kind of common law of the civilised world. Although these principles, which are commonly known as Private International Law, strictly constitute a kind of supplement to the territorial law of every civilised State, yet they really rest on a basis of comity and mutual convenience, and possess in some

degree an international character. In deference to these principles we find that the Courts of one State sometimes give an extra-territorial effect to their own domestic law whilst at other times they concede an extra-territorial effect to the law of some other State, and the same applies also in the matter of jurisdiction. The nature and operation of these principles, in so far as they fall within the scope of this work, will be discussed in connection with the case next following.

Legal and Jurisdictional Units.—In general the units of international law are States and it is to the relations of independent States that the principles previously indicated are specially applicable. It needs to be noticed however that in relation to the question of the operation of law and the exercise of jurisdiction every country which possesses a separate legal and judicial system is regarded as a separate unit even though in other respects it may be politically dependent on or form part of a larger union. In most cases, indeed, the area over which the Sovereign rules is co-extensive with the area over which the Courts have jurisdiction, there is one system of law and one system of judicature for the whole State and in such cases the State constitutes at once the international and jurisdictional unit. But in other cases it may happen that a State is made up of a variety of countries and areas, each of which, although ultimately subject to some common authority, has its own system of law and its own system of judicature. From this it will be seen that, so far as concerns the operation of the territorial law and the exercise of jurisdiction, not only do England, Scotland, and Ireland, as well as the more important colonies and dependencies, constitute separate units but the law and jurisdiction of each is regarded as "foreign" in relation to any other, except in so far as this is affected by imperial legislation or by the existence of common Courts of Appeal (a). So, again, in the United States of America each of the various States composing the union, although subject to federal legislation and authority in matters prescribed by the constitution, yet possesses its own legal and judicial system, and the law of one State is regarded primarily as "foreign" in the Courts of other States. And the same observation applies to the various States composing the Commonwealth of Australia, subject, however, to such limitations as are imposed either by imperial Act or by the federal Parliament within the limits of the constitution. In the case of the Commonwealth of Australia and the Dominion of Canada, indeed, there are three sets of authorities—the Imperial, the Federal, and the State—each occupying either by convention or by law, a separate sphere. As between countries which form part of the same State, the doctrine of extraterritoriality has of course no application; nor can the assumption of an extra-territorial criminal jurisdiction give rise to questions such as may occur between independent States. Moreover, the exclusiveness of the local law-making power and the jurisdictional right is often modified by the legislation of some paramount

(a) P 238, *supra*

authority. If, however, allowance be made for these considerations, then the general principles governing the territorial competency of the Courts and Legislatures of independent States would appear to be equally applicable to all countries that possess a separate legal and judicial system.

Jurisdiction and Law in Criminal Cases.—In criminal cases, as we have seen, the question of competency in the matter of jurisdiction and the question of what law shall be applied are commonly identical, for the reason that the Courts of one State will not generally either recognise or enforce the criminal or penal law of any other State. Once therefore, there is jurisdiction in a case of crime, then the national law, and that only, will be applied. The question of jurisdiction is primarily a matter which each State settles for itself and the grounds upon which jurisdiction is claimed in criminal cases vary greatly in different systems of municipal law. All States alike will exercise jurisdiction over offences committed within their territory. Some deviate from this only in a limited class of cases, others assume a wide personal jurisdiction over their subjects even when outside the State territory, and refuse on this ground to surrender subjects who may have committed offences within foreign territory, whilst others, again, claim, under certain conditions, to exercise a general jurisdiction over offences committed by foreigners even on foreign soil. Although the question of criminal jurisdiction is for the most part a question of municipal law, yet it has as will be seen by reference to the cases of *Vogt* and *Cutting*, at certain points an important bearing in the domain of external relations. In general it would seem that it is only the territorial claim which is entitled to external recognition, or at any rate, that this claim is to be preferred in the case of competing claims.

The Disadvantages of the Extra-territorial Principle in Criminal Cases.—The system under which a criminal jurisdiction is claimed or exercised by a State over offences committed outside its territory is, for the most part, and saving certain necessary exceptions (b) at bottom a bad one. It tends to obstruct or impede the course of justice by making the prosecution of crime difficult and expensive, owing to need of transporting witnesses and proofs to another country than that in which the crime was committed. By dissociating punishment from the locality of the offence, it also tends to diminish its deterrent effect. Nor is it commonly necessary, for the reason that the escape of the offender to another country can generally be met by a proper system of extradition. It is also anomalous, for the reason that whilst it rests in some measure itself on a territorial basis—viz, the presence of the offender within the territory—it is really subversive of the territorial

(b) As where the offence is committed in territory not occupied by a civilised Power, or where the act done outside the territory depends for its character on some act previously done within the territory, or where the offence affects the safety or public order of the State exercising jurisdiction.

principle. Finally, as was pointed out in *Cutting's Case*, it is a system which, when applied to offences committed by foreigners in foreign territory, is open to grave abuses (c).

THE "LOTUS"

[1927] P. C. I. J. Series A. No. 9.

On August 2, 1926, a collision occurred between the French mail steamer "Lotus" and the Turkish collier "Boz-Kourt" between five and six nautical miles north of Cape Sigri (Mitylene), i.e., on the high seas outside territorial waters. The "Boz-Kourt", which was cut in two, sank, and eight Turkish nationals who were on board perished. On arrival of the "Lotus" at Constantinople, the Turkish authorities, after enquiry, arrested both the captain of the "Boz-Kourt", Hassan Bey, and Lieut. Demons, navigating officer of the "Lotus" at the time of the collision. On August 28 the Criminal Court of Stamboul began the trial of these two persons on a charge of manslaughter (d). Lieut. Demons pleaded to the jurisdiction, but the Court held it had jurisdiction. On September 15 the Court sentenced Lieut. Demons to eighty days imprisonment and a fine of £32, Hassan Bey being sentenced to a slightly more severe penalty. The Turkish Public Prosecutor appealed against this decision, the effect of which was to suspend its execution, and the appeal was still pending at the time of the proceedings at The Hague. The arrest of Lieut. Demons at once led to diplomatic representations by the French Government, and after negotiations a *compromis* was signed on October 12, 1926, referring the dispute to the Permanent Court in the following terms :

(1) Has Turkey, contrary to Article 15 (e) of the Convention of Lausanne of July 24, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so what principles—by instituting, following the collision which occurred on August 2, 1926, on the

(c) On the subject generally, see Hall, 261; Westlake, i. 251.

(d) Under Art. 6 of the Turkish Penal Courts which gives Turkish Courts jurisdiction over offences against Turkish nationals anywhere.

(e) Whereby it was agreed that all questions of jurisdiction as between Turkey and the other Contracting Party should be decided in accordance with the principles of international law.—(Convention IV.)

high seas between the French steamer "Lotus" and the Turkish steamer "Boz-Kourt" and upon arrival of the French steamer at Constantinople—as well as against the master of the Turkish vessel—joint criminal proceedings under Turkish law against M. Demons, the officer of the watch of the "Lotus" at the time of the collision, in consequence of the loss of the "Boz-Kourt" having involved the death of eight Turkish seamen and passengers?

(2) Should the reply be in the affirmative, what pecuniary reparation is due to M. Demons, provided, according to the principles of international law, reparation should be made in similar cases?

Judgment.] The Court was not called on to decide whether the particular provision of Turkish law applied to the case was or was not contrary to international law. The issue was whether general international law, referred to in Article 15 of the Convention of Lausanne, contained a rule prohibiting Turkey from prosecuting Lieut. Demons under the circumstances of the case.

France had contended that international law does not allow a State to take proceedings with regard to offences committed abroad simply because of the nationality of the victim. She maintained that here the offence had been committed on the French ship, and that international law recognised the exclusive jurisdiction of the State whose flag was being flown as regards everything taking place on board a ship on the high seas, and that this applied especially to the case of collisions at sea.

It was certain that Courts of many countries interpret their criminal law in the sense that, though the authors of the offence may be abroad at the time of its commission, they are held liable because its effects have taken place on the national territory.

Thus, once it was admitted that the effects of the offence were produced on the Turkish vessel, it was impossible to hold that there is a rule of international law prohibiting prosecution because the author of the offence was at the time on board a French ship.

On the question whether a State whose flag is flown has exclusive jurisdiction, the Court held that the most that could be said was that by virtue of the principle of freedom of the seas the ship is placed in the same position as national territory.

This means that whatever occurs on board must be regarded as if it had occurred on the territory. If the guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principle applies as if the territory of two different States were concerned. There is no rule of international law prohibiting the State where the effects of the offence took place from regarding it as having been committed on its territory. The French Government had failed to bring any conclusive proof of any customary rule of international law reserving exclusive jurisdiction to the flag State. It was true that nearly all writers stated that exclusive jurisdiction was with the flag State, but in general what they stated appeared not inconsistent with the view of the Court that the jurisdiction of a State over its ships on the high seas is the same as that of its jurisdiction in its own territory.

The precedents were not of great value. In the *Costa Rica Packet Case* the prauw was adrift without flag or crew. There was no lack of cases where there had been prosecution for offences on board foreign ships in port. There was no special rule as to collision cases—the national decisions are divided.

The offence for which Lieut. Demons was prosecuted was an act of negligence having its origin on board the "Lotus", whilst its effects made themselves felt on the "Boz-Kourt". The true elements were legally entirely inseparable. The requirements of justice and the protection of the interests of the two States made it natural that jurisdiction should be allowed to each. It was therefore a case of concurrent jurisdiction.

There was, therefore, no principle of international law within the meaning of Article 15 of the Convention of Lausanne of July 24, 1923, which precluded the institution of the proceedings in question. Thus, Turkey had not acted contrary to the principles of international law within the meaning of the special agreement between the parties.

This case was decided by the casting vote of the president (Loder, Weiss, Lord Finlay, Nyholm, and Altamira dissenting on the general question, and Moore on a special point). The question may not be entirely settled. The decision of the majority on the facts of the case has perhaps a slight balance in its favour. Two distinct elements in

the offence of manslaughter, the killing and the negligence took place on the ships of two different nations, and though it is at least arguable whether in such a case the real offence is not the negligence which occurred on the French ship, yet all the witnesses were present at Constantinople, and convenience was therefore on the side of a Turkish claim to concurrent jurisdiction. On the other it may generally be fairer to an accused person that he should, in the case of an offence committed within the jurisdiction of the Courts of his own country, be tried by those Courts rather than by those of a foreign country whose laws may differ from those to which he would ordinarily be subject, except when in that country. If the judgment be treated as going beyond the fact that the alleged crime took effect on a Turkish ship, and in any way sanctioned the claim of a State to legislate so as to confer on its Courts jurisdiction in any criminal case affecting its own subjects arising on a foreign ship on the high seas, it would be open to much graver objection. Loder puts one point of objection to the decision when he declares that Turkey's contention is that under international law everything which is not prohibited is permitted, and that this contention is at variance with the spirit of international law (at p. 34). See also Nyholm (at p. 63).

The ease was contrasted with *R. v. Keyn* (q.v.) in a learned article by Beckett (f) referred to in Finlay's dissenting judgment (at p. 57).

The common ground between the two cases is the question of the localisation of the offence, and *R. v. Keyn* was cited by France in support of her contention that the offence must be considered as having been committed on board the French vessel. The Court, however, rejecting the authority of this case, referred to *R. v. Nillins* and *R. v. Godfrey*, in the contrary sense.

R. v. NILLINS

(1884), 53 L. J. M. C. 157.

In this case the accused, being in Southampton, wrote letters to Germany containing false pretences inducing certain persons in Germany to deliver goods to certain other persons. On appeal to the Queen's Bench from the magistrate's order for extradition, the Law Officers of the Crown appeared and argued in favour of extradition, with the result that the Court upheld the magistrate's order.

R. v. GODFREY

92 L. J. K. B. 205; [1923] 1 K. B. 24.

ON September 13, 1922, Godfrey was committed at Bow Street to be surrendered to Switzerland to take his trial upon a

(f) B. Y. B. 1927, 108.

charge of obtaining goods by false pretences. Godfrey was a member of a firm carrying on business in England, other members of which had obtained the goods. It was contended that Godfrey, though in England at the time, was an accessory before the fact and liable as principal.

A writ of *habeas corpus*, which would have had the effect of defeating the warrant of committal, was refused by Hewart, L.C.J., Ivory, J., and Sankey, J., who held that a person, alleged to have committed a crime in a foreign country which seeks his extradition from this country, need not have been physically present in the foreign country at the time of the alleged offence for him to be a "fugitive criminal" within the meaning of section 26 of the Extradition Act, 1870.

CIVIL JURISDICTION

SIRDAR GURDYAL SINGH v. THE RAJAH OF FARIDKOTE

[1894] A. C. 670.

THIS was an appeal in an action originally brought by the Rajah of Faridkote (the present respondent) against Sirdar Gurdyal Singh (the present appellant) in the Indian Courts. The action was itself based on certain judgments previously obtained by the plaintiff against the defendant in the Courts of Faridkote. Faridkote is a native State of India, which is under British protection but does not constitute an integral part of the British dominions, and which possesses, therefore, those attributes of an independent State, such as the right of enacting its own laws and exercising jurisdiction through its own Courts, which are compatible with protection and political dependence. The defendant had been treasurer of Faridkote, and was alleged in that capacity to have become indebted to the plaintiff in certain large sums of money. After the defendant had ceased to be treasurer, and had left Faridkote and become domiciled in Jhind, another protected State, the plaintiff instituted proceedings against the defendant in the civil Courts of Faridkote; the defendant, although notified of these proceedings, did not appear;

and judgment in each case was accordingly given in favour of the plaintiff for sums amounting in all to Rs.76,474.11.3 and costs. The defendant had no assets in Faridkote, and the plaintiff did not think fit to take proceedings in Jhind; but the defendant having meanwhile engaged in trading transactions at Lahore, and being for this reason subject to the jurisdiction of the Indian Courts, two actions based on the Faridkote judgments were there-upon brought by the plaintiff against the defendant in the Courts of Lahore. In the lower Courts these actions failed, it having been held that the Faridkote Court had, under the circumstances, no jurisdiction as against the defendant; but on appeal to the chief Court of the Punjab the jurisdiction of the Faridkote Court was upheld and judgment given in favour of the plaintiff. From this judgment the defendant now appealed to the Privy Council. In the result it was held by the Judicial Committee that no territorial legislation can give jurisdiction, which any foreign Court ought to recognise, against absent foreigners who owe no allegiance or obedience to the legislative Power; that in all personal actions the Courts of the country in which the defendant resides, and not the Courts of the country where the cause of action arose, should be resorted to; that for this reason the decrees of the Faridkote Court were a nullity by international law, and that the actions brought upon them in the Indian Courts must therefore fail. Judgment was accordingly given in favour of the appellant, with costs.

Judgment.] In the judgment of the Judicial Committee, which was delivered by Lord Selborne, Faridkote was defined as a native State, the Rajah of which had been recognised by the Crown as having an independent civil, criminal, and fiscal jurisdiction; with the result that the judgments of its Courts were to be regarded as foreign judgments, on which actions could be brought in the Courts of British India. At the time of the institution of the proceedings in the Faridkote Courts, however, the appellant (the original defendant) had ceased to reside in Faridkote, to which he never returned, and had become domiciled in another independent native State, that of Jhind. Although he had notice of the proceedings in the Faridkote Court, he disregarded them, and did not appear or otherwise submit himself to the jurisdiction; nor was he, indeed, under any obligation to do so, unless that Court had lawful jurisdiction over him. On

the question whether the Faridkote Courts had such jurisdiction, it was held that, in the circumstances stated, there was nothing to take the case out of the general rule that a plaintiff must sue in the Court to which the defendant is subject at the time of the suit, *actor sequitur forum rei*; which was rightly stated by Phillimore (Int. Law, iv, s. 891) "to lie at the root of all international, of most domestic jurisprudence in this matter". All jurisdiction was properly territorial, and *extra territorium jus dicenti, impune non paretur*. Subject to special exceptions, territorial jurisdiction was exercisable over all persons either permanently or temporarily resident within the territory, while they remain within it; but it did not follow them after they had withdrawn from it, and when they were living in another independent country. Such a jurisdiction, indeed, always existed as to land within the territory; and it might be exercised over movables within the territory; whilst in questions of status or succession, governed by domicile, it might exist as to all persons domiciled, or who when living were domiciled within the territory. As between different provinces under one sovereignty, the Legislature of the Sovereign might regulate such jurisdiction; but no territorial Legislature could give jurisdiction which any foreign Court ought to recognise, as against foreigners who owed no allegiance or obedience to the legislative Power. In a personal action, to which none of these causes of jurisdiction applied, a decree pronounced *in absentia* by a foreign Court, to the jurisdiction of which the defendant had not in any way submitted, was therefore an absolute nullity. These doctrines were laid down by all the leading authorities on international law; and no exception was made to them in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of a country in which the cause of action arose (g).

Although this case belongs rather to the subject of private than public international law, yet it deals incidentally with certain matters that have an important bearing on questions of international organisation. In the first place, it serves to illustrate the position of those

(g) The question, it will be observed, is here dealt with from an international standpoint. This serves to distinguish the case from *Ashbury v Ellis*. [1893] A. C. 339, with which it is sometimes thought to be in conflict.

countries or communities which, whilst politically part of a larger State, are nevertheless regarded, in virtue of having their own system of private law and their own judicial system, as separate legal and jurisdictional units. Next, it serves to illustrate the principle that, from an international standpoint, both the law and the jurisdiction of a State are, in civil matters as well as in criminal, primarily territorial. "All jurisdiction", it was said, "is properly territorial", and "territorial jurisdiction is exercisable only over persons permanently or temporarily resident within the territory". Nor could a man be called upon to defend himself before a jurisdiction to which he was not territorially subject, and to which he had not otherwise submitted himself. Finally, by its enunciation of the principle that the plaintiff must sue in the Court of the defendant, which frequently necessitates the assumption of jurisdiction over foreign transactions, and the application of some rule of foreign law, and by its reference to the exceptions to the ordinary rule of territorial jurisdiction, it serves to direct attention to the general character of that body of principles known as private international law, in virtue of which an extra-territorial jurisdiction and an extra-territorial application of law, in civil cases, are conceded or required by usage and comity.

Law and Jurisdiction in Civil Cases.—In civil cases, as in criminal, both the law and the jurisdiction of every country constituting a separate legal and judicial unit are primarily territorial. Its law is intended primarily to govern the civil rights of persons who are found within its territory, and the legal effect of acts and transactions that occur there; whilst the jurisdiction of its Courts is exercisable primarily over persons and things within its territory, and in relation to similar acts and transactions. The more important exceptions to this principle have already been noticed, but as regards civil cases certain points need to be further emphasised. One is that, whilst in criminal cases questions of law and jurisdiction are identical, in civil cases they are often distinct; with the result that a Court competent in the matter of jurisdiction will often apply to its decision a rule of foreign law, or give effect to rights acquired thereunder. Another is that although in civil as in criminal cases it is competent to any country, by positive provision, to extend its law and jurisdiction to foreign persons, things, or transactions, and although such a provision, if duly made, will be given effect to within its own territory, yet in so far as this exceeds the generally accepted limit it will not be recognised or given effect to by the laws of other countries. At the same time such an extension of the national law and jurisdiction, *proprio vigore*, is a common incident of most municipal systems; although here it will not be possible to do more than glance briefly at the general character of such extensions under the English system. Finally, we need to notice that, in civil cases, by far the more important exceptions to the territorial principle, involving both a concession and relaxation of sovereignty, accrue by virtue of the operation of the principles of

private international law, in deference to which an extra territorial jurisdiction or an extra territorial application of law, or of rights acquired thereunder, is exercised or conceded by or as between the Courts of different countries. Thus, in the matter of jurisdiction, although in personal actions it is generally necessary that the defendant should be resident or present in the country before whose Courts he is cited, yet there are cases in which a jurisdiction may be rightly assumed over an absent defendant, as where he has expressly or impliedly accepted the jurisdiction, or where the subject of the action is properly situated within the territory. Again, in the matter of the law to be applied, it may often happen that although jurisdiction exists, as where the defendant is resident within the country, yet the cause of action may relate to some foreign act or transaction as regards which it is only just and proper that its legal effects should be measured by the law of the place where it occurred.

Extra-territorial Application of Domestic Law by Positive Provision.

—Confining ourselves to the English system, we find that although the English law is in civil cases, as in criminal, primarily territorial in the sense previously described (*h*), yet it is competent to the imperial Parliament if it thinks fit, to extend its operation and if Parliament expressly or impliedly manifests such an intention, then it will be incumbent on all British Courts within the limits of their respective jurisdictions to give effect to it. Hence the question of the application of laws enacted by Parliament to persons, things, or transactions outside the territory usually resolves itself into a question of construction. On this principle British statutes have been held applicable to British subjects outside the jurisdiction (*i*), and, indeed on such matters as personal status or capacity this is always presumed (*h*). So, British statutes may bind the property of British subjects, other than foreign land, held by them outside the jurisdiction (*l*). On the same principle British statutes have been held to confer rights on foreigners outside the jurisdiction (*m*). But with respect to statutes imposing obligations there will always be a very strong presumption against such an intention, for the reason that this would infringe the principle of the exclusive sovereignty and jurisdiction of other States within their own limits. Hence it is an accepted rule of construction that every statute

(*h*) See *The Zollverein*, Swab Adm Rep 96, and *Cope v Doherty*, 27 L J Ch 600, although the effect of this decision has now been altered by the later Merchant Shipping Acts.

(*i*) *The Sussex Peerage Case*, 11 Cl & F at p 146.

(*k*) *Brook v Brook*, 9 H L C 193.

(*l*) *Colquhoun v Brooks*, 14 App Cas 493, although the Bankruptcy Act, 1883, appears in terms to apply to land both in a British colony and elsewhere, *Williams v Davies*, [1891] A C 460.

(*m*) *Davidson v Hill*, [1901] 2 K B 606. In *Jeffreys v Boosey*, 4 H L C 815 indeed, it was held that the Copyright Act, 8 Ann, c 19, did not apply to an alien but in *Routledge v Low* L R 3 H L 100, it was held that a later Act 5 & 6 Vict c 45, did apply, although in this case the alien was temporarily present in a British colony.

must, so far as its language admits, be interpreted and applied so as not to conflict with the rights of other States or the established rules of international law (n); and that all general terms must be narrowed in order to avoid such a result (o). And so, with respect to other systems than the English, it may be said that the territorial law of one State can have no intrinsic force except within its territorial limits, for although it may purport to apply beyond these limits, and although such a provision may be enforced as against persons subsequently coming within the local jurisdiction, or property belonging to them which may be found there, yet such an extended application cannot be made the foundation of rights or duties which the Courts of other countries will recognise or enforce.

Extra-territorial Jurisdiction.—The grounds upon which the jurisdiction exercisable by English Courts in civil cases rests vary greatly according to the nature of the suit. But if we exclude suits of a special nature, such as those brought in relation to matters of admiralty, bankruptcy, marriage or divorce, and probate or administration, as outside the scope of this note, it will be sufficient for our present purpose to call attention to the following points: (1) Suits relating to foreign land will always be regarded as outside the jurisdiction, and must be brought in the Courts of the State where the land is situated; whilst, conversely, suits relating to English land will also be a proper subject of jurisdiction even though the owner be outside the territory (p). (2) In personal actions (q) jurisdiction is primarily based on the presence of the defendant, and the service of process on him, within the jurisdiction (r). (3) But by various statutes passed from time to time the service of process outside the jurisdiction was allowed in certain specified cases, whilst by the rules at present in force under the Judicature Acts of 1873 and 1875 the service of process, or of notice in lieu of process, outside the jurisdiction may, at the discretion of the Court, be allowed in the cases specified by the rules; as where the suit relates directly or indirectly to land or hereditaments within the jurisdiction; or relief is sought against a person domiciled or ordinarily resident within the jurisdiction; or where the suit is for breach of some contract which was to be performed within the

(n) *Per Maule, J.*, in *Leroux v. Brown*, 12 C. B. 801; see also *Lopez v. Burslem*, 4 Moo. P. C. at p. 305; *Att.-Gen. v. Campbell*, L. R. 5 H. L. 524; *The Amalia*, 1 Moo. P. C. N. S. 471; *Bulkeley v. Schutz*, L. R. 3 P. C. at p. 769; *Ex p. Blain*, 12 Ch. D., at p. 526; and for a summary of principles, *Russell v. Cambefort*, 23 Q. B. D. 526.

(o) *Le Louis*, 2 Dods., at p. 239.

(p) *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, and *Potter v. Broken Hill Proprietary Co.*, 3 C. L. R. 479; but as to the enforcement of personal equities, see *Penn v. Baltimore*, 1 Ves. Senr. 444.

(q) These at common law were styled "transitory" actions.

(r) See *Jackson v. Spittall*, L. R. 5 C. P. 542, 549; *Ewing v. Orr-Ewing*, 10 App. Cas. 453, 531; and the judgment of Lord Mansfield in *Mostyn v. Fabrigas*, 1 Cowp. 161. Subject to this, any person might maintain a suit as plaintiff, although, if non-resident, security for costs might be exacted.

jurisdiction; or where it is sought to restrain the commission of some wrongful act within the jurisdiction.

Private International Law: (i) *Subject-matter*.—Private international law is a body of principles for determining questions of jurisdiction, and questions as to the selection of the appropriate law, in civil cases which present themselves for decision before the Courts of one State or country, but which involve a "foreign element", in the sense next described (s). Where a transaction occurs wholly within a particular "country", all the parties being present there, then the Courts of that country alone will be competent to exercise jurisdiction; and its territorial law alone will be applicable. But in the complicated social and commercial relations of modern life it often happens that cases present themselves for decision before the Courts of one country, which affect foreign persons, or foreign things, or transactions that have been entered into wholly or partly in a foreign country or with reference to some foreign system of law. Such cases are then said to involve a "foreign element", in the sense of being justly regulatable as to their legal consequences by the law of some foreign system. It is with this class of cases that private international law is concerned. It includes in its range a great variety of topics; such as questions of status or capacity, questions as to the title to or transfer or devolution of different kinds of property, including testate or intestate succession, questions as to the validity and effect of contracts, questions as to liability for wrongs other than crimes, and more especially questions as to the recognition and enforcement of foreign judgments (t). Thus, an English Court may be asked to adjudicate on the legitimation of a child born in Scotland, or the validity of a marriage contracted in France by persons then domiciled in Portugal, or as to the effect of an American divorce, or as to the validity of an assignment of movable property made in Norway, or as to the effect of a contract made in France and to be performed in Italy, or as to the effect on English property of a will made abroad by a foreign testator, or as to the distribution of the English property of a foreign intestate; or as to the effect of a judgment rendered in Germany, or a sequestration order made in Victoria, or a Canadian discharge in bankruptcy. And similar questions may, of course, present themselves for decision before the Courts of other States. In cases such as these the question may arise (1) as to whether the Court is internationally competent in the matter of jurisdiction; (2) as to what law should be properly applied to its decisions (u); whilst, later on, (3) the further question

(s) Dicey, *Conflict of Laws*, 1; Westlake, i. 239; Cheshire, Chapter i.

(t) It is at this point and by this means that questions as to the competency and rightful exercise of jurisdiction by foreign Courts are raised.

(u) Although it should be noticed that, in strictness, the English Courts do not purport to enforce foreign law, but merely rights acquired thereunder; Dicey, *Conflict of Laws*, 25; Cheshire, 1st ed., p. 6.

may arise as to what effect should be given to its judgment in the Courts of some other country in which it is sought to be enforced (*a*).

(ii) *Its Juridicā Character and Basis*.—This body of principles is of comparatively modern growth (*b*). It is commonly stated not to be part of international law proper, for the reasons—(1) that it is concerned with the relations of individuals and not of States; (2) that it derives its force immediately from the sovereignty of the State by whose Courts it is administered, and not from international usage or agreement; and (3) that its remedies have to be sought in municipal Courts, and are therefore wholly distinct from those that obtain between States. According to this view, what is commonly called “private international law” really constitutes a part or branch of each system of national law. From this standpoint, both the law of England, and that of every other civilised State, may, in its broadest sense, be said to consist of two branches: (1) the domestic or territorial law, which is primarily applicable to all persons, things, and transactions within its territory; and (2) a kind of supplementary code, embracing the principles of private international law, which are applied in cases that involve some foreign element (*c*). For the like reasons many writers prefer to use the terms “the conflict of laws”, or “comity”, or “international private law” (*d*). Nevertheless, the term “private international law” is usual and convenient; and is not, perhaps, so misleading as is commonly supposed. For this body of rules really possesses in some degree an international character. It rests, as a whole, on a basis of international comity; and perhaps also on a basis of mutuality in so far as its rules are definitely settled (*e*). Its object is—(1) to secure that rights duly acquired under the law of one country shall be recognised and enforced in any other country, in which such recognition or enforcement may be material; and (2) to confer jurisdiction on that country whose Courts, in the circumstances, are best able to deal with the case and to make their judgment effective. In this way it may be said that this body of principles occupies an important place in the existing scheme of international organisation. Even now similar, although not identical, principles are followed by the Courts of most civilised States.

(a) On the subject generally, see Dicey, *Conflict of Laws*, 1-11.

(b) Dicey, *ibid.*, p. 6. Its development in England and America has been largely influenced by the works of Story and Westlake.

(c) *Ibid.*, pp. 3-4.

(d) For an examination of these terms, see Holland, *Jurisprudence*, 419 *et seq.*, and Dicey, 9

(e) *Simpson v. Fogo*, 32 L. J. Ch. 249, although this is perhaps questionable.

*EXTRADITION***U.S. v. RAUSCHER**

(1886), 119 U. S. 407.

THE prisoner had been indicted, under the laws of the United States, for having, whilst serving as mate on board an American vessel, unlawfully assaulted and inflicted cruel and unusual punishment on one Janssen, a member of the crew; and had been found guilty. In arrest of judgment, it was moved on behalf of the prisoner that inasmuch as he had been surrendered by Great Britain to the United States on a charge of murder, it was not competent to try him on a charge different from that for which he had been surrendered, and that the conviction ought therefore to be set aside. The Judges of the Circuit Court being divided on this question, the matter was carried to the Supreme Court. Here it was held that the conviction must be set aside, on the ground that where a person had been brought within the jurisdiction of the Court by virtue of proceedings under an extradition treaty, he could only be tried for one of the offences mentioned in the treaty, and for the offence with which he had actually been charged in the extradition proceedings, at any rate until a reasonable opportunity had been given him to return to the country from which he had been brought.

Judgment.] The judgment of the Supreme Court was delivered by Mr. Justice Miller. After referring to the facts, and to the provisions of the treaty of 1842, under which the prisoner had been surrendered, the learned Judge pointed out that the practice of surrender now depended on treaty; and that apart from treaty no well-defined obligation to surrender existed, although in comity, and at the discretion of the Government whose action was involved, such surrender was sometimes made. In the United States the extradition of criminals was, in the opinion of the Court, a matter exclusively within the jurisdiction of the Federal Government, and not of the States. This was now all the more clear for the reason that the practice of extradition, as between the United States and nearly all other nations, had come to be regulated by treaty; such treaties being supplemented by Acts of Congress.

The question in the present case depended on the treaty of

1842, made between the United States and Great Britain, and upon certain Acts of Congress, the provisions of which were embodied in §§ 5270, 5272, and 5275 of the revised statutes. This treaty, as part of the law of the land, the Court was bound both to take judicial notice of and to construe. According to the opinions of the writers on international law, a country receiving an offender against its laws from another country had no right to proceed against him for any other offence than that for which he had been surrendered. In cases where there was no treaty, such a condition was almost a necessary adjunct to the discretionary exercise of the power of rendition ; for the reason that a Government, although it might be willing to surrender for grave offences, would scarcely be willing to surrender for minor offences, or offences of a political character, and would not, therefore, be willing to surrender except on the allegation and proof of some specific offence, and subject also to certain limitations with respect to the subsequent prosecution of the party. Similar principles had now been imported into the obligations resting on treaties. In most of these treaties the enumeration of offences was so specific, and marked by such a clear line in regard to the magnitude and importance of such offences, that it was impossible to come to any other conclusion than that the right of extradition was intended to be excluded in the case of other offences than those specifically referred to.

That the present treaty did not intend to depart from the recognised public law that prevailed in the absence of treaties, and did not intend that extradition should avail for any other offence than one of those enumerated in the treaty, seemed clear, not only on the general principle that the specific enumeration of certain matters implied the exclusion of all others, but also from its general tenor and the processes by which it was to be carried into effect. If a person surrendered for one offence was liable to be tried for another, it was difficult to see why the demand for surrender had to be based on the description of some specific offence. In the present case, moreover, the treaty required not only that the party should be charged with one of the crimes specifically mentioned, but also that such evidence should be produced of the commission of the offence as would suffice to justify commitment for trial by the law of the country from which extradition was sought. Nor, if such was the intention

of the treaty, could it be said that its provisions in this respect were not equally obligatory on the country demanding extradition, after the extradition had been effected. The transfer having been made for a definite and limited purpose, no jurisdiction inconsistent with such purpose could well be exercised by the receiving country, except at the cost of a breach of faith towards the country making the surrender and of fraud on the rights of the party surrendered. If any doubt remained as to whether this was the proper construction, the language of the two Acts of Congress previously cited served to set this at rest. The obvious meaning of those statutes, which related to all extradition treaties made by the United States, was, on the one hand, that a person should not be surrendered by the United States to be tried for any offence other than that charged in the extradition proceedings; and, on the other, that when surrendered to the United States he should not be tried for any other offence than that with which he was charged, until he had had a reasonable time to return unmolested to the country from which he was brought.

This and the following case are cited as illustrating some of the more important principles that govern the practice of extradition as between independent States. In *The United States v. Rauscher* it was decided that where a person has been surrendered for one offence he cannot be tried for another, unless he has in the meantime been freed from the restraint involved in the extradition process. And this principle may be said to represent the correct international usage on this subject; except in cases where a contrary intention is clearly expressed (*f*). This decision also put an end to a long-standing controversy between Great Britain and the United States on this point; the United States having previously insisted, both in *Lawrence's Case* and in *Winslow's Case*, that when once a person had been duly extradited he became for all purposes subject to the local jurisdiction (*g*). The rule contended for by Great Britain was finally affirmed in *The United States v. Rauscher*; and has since been expressly incorporated in the extradition treaty of 1890 between Great Britain and the U. S. A.

(*f*) Westlake, i. 250. The principle has been applied in a number of cases in various countries, e.g., *Buck v. The King*, Supreme Court of Canada, [1917] 55 S. C. R. 133, Scott and Jaeger, p. 403; *Germany Reichsgericht in Criminal Matters*, April 4, 1921 (annual Digest, 1919-22, Case No. 182).

(*g*) See Wharton, Dig. ii. 758; Wheaton (Keith), 223; Moore Dig. iv. 306.

RE CASTIONI

60 L. J. M. C. 22; [1891] 1 Q. B. 149.

CASTIONI, a Swiss subject, was arrested in England on the requisition of the Swiss Government, on a charge of murder, and was subsequently remitted to prison by the magistrate before whom the charge had been heard, with a view to his surrender. The present application was for an order calling on the magistrate, and the Consul-General of Switzerland, and the Solicitor to the Treasury, to show cause why a writ of *habeas corpus* should not issue to bring up the body of Castioni with a view to his discharge from custody. The facts were shortly these: In September, 1890, a political disturbance took place in the canton of Ticino, arising out of certain administrative abuses alleged to exist there, and out of a refusal by the Government to submit to the popular vote a revision of the constitution, for the remedying of such abuses. A number of citizens of Bellinzona, including the prisoner, thereupon seized the arsenal, and having thus provided themselves with arms and overcome the police, marched to the municipal palace demanding admittance. In default an entrance was forced, and in the scuffle that ensued a municipal councillor named Rossi was shot at and killed by the prisoner. It did not appear that the prisoner had any previous knowledge of Rossi, or that the act was in any way one of private malice; but neither did it appear that the killing of Rossi was necessary to the success of the insurrection. A provisional Government was formed by the insurgents, but was soon afterwards suppressed, whereupon Castioni took refuge in England. It is provided by the Extradition Act, 1870, s. 3 (1), that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. The question was whether the prisoner's act came under this category. It was held that it did; and on this ground the prisoner was discharged.

Judgment.] The Divisional Court, comprising three Judges, held unanimously that crimes, otherwise extraditable, became political offences if they were incidental to and formed part of a political disturbance. Proceeding to apply this principle to the case before the Court, it was held in effect that, although the

killing of Rossi might have been a cruel and unnecessary act, yet inasmuch as the prisoner had no private spite against Rossi, who was unknown to him, and as the act appeared also to have been done in furtherance of the rising, the offence must be deemed one of a political character, and the prisoner must be set at liberty. At the same time Hawkins, J., took occasion to observe that it must not be assumed that any act done in the course of a political rising was of itself necessarily of a political character. For if a man, even though in the course of a political rising, deliberately and as a matter of private revenge, and for the purpose of doing an injury to another, shot an unoffending man, he would undoubtedly be guilty of the crime of murder, and in such a case the offence could not be said to have any relation at all to a political crime.

This decision, although primarily a decision on a question arising under the British Extradition Act, 1870, serves to illustrate the nature and scope of the rule, now almost universally adopted, that extradition does not extend to political offences. The definition of a political offence adopted by the Court is that suggested by Stephen in his *History of the Criminal Law* (h).

In the subsequent case of *Re Mcunier*, [1894] 2 Q. B. 415, however—where the prisoner, who was an anarchist, was proved to have caused two explosions, one at the Café Véry in Paris, which had caused the death of two persons, and the other at certain barracks—it was held that in order to constitute a political offence there must be two or more parties in the State, each seeking to impose the government of its choice on the other, and that if an offence were committed by one side or the other in pursuance of that object, then it would be regarded as having a political character, but otherwise not. In view of the fact that such conditions were not present in *Mcunier's Case*, that the accused was in fact identified with the party of anarchy and inimical to all government, and that his efforts, even though incidentally directed against a particular government, were primarily directed against the general body of citizens, it was held that the offence was not political; and the prisoner was accordingly surrendered to the French authorities.

The rule as to non-extradition of political offenders is very generally accepted, but decisions as to what crimes are purely political vary. Thus, in 1928 in the *Pavan Case*, Annual Digest, 1927-8, No. 239, the Swiss Federal Court accepted the request by the French Government for the extradition of an Italian who had shot and killed, in Paris, a Fascist official, though it appeared that one motive for the crime was to disorganise the Fascist spy system in France. See also *Re Kaphengst*, [1930] Annual Digest, 1929-30,

(h) Vol. II.; Oppenheim, i. 564.

No. 188, and *Re Richard Eckermann*, Annual Digest, 1929-30, Case No. 189. Scott and Jaeger, p. 400. In 1934 the Italian Court of Appeal at Turin refused the extradition of the assassins of King Alexander of Yugo-Slavia and M. Barthou, requested by the French Government on the grounds of the political nature of the crime: *Case of Pavelitch and Kraternik*, Hudson Cases, p. 945.

Extradition Generally.—Crimes committed within the jurisdiction of a foreign State and not affecting the State in whose territory the offender is found are almost invariably regarded as being outside the scope of the law of the latter. Nor, as has already been pointed out, will one State, except in so far as this may be involved in extradition (i), give effect to the criminal law of another State. In such cases, therefore, the only question will be how far a State, in which a foreign criminal has taken refuge, is bound, in view of the common interest in the repression of crime, to surrender him to the State claiming to have jurisdiction over the offence. On this question there was formerly much divergence both of opinion and practice. But at the present time the rule enunciated in *The United States v. Rauscher*, to the effect that apart from treaty there is no legal obligation to surrender, even though in comity and at the discretion of the Government whose action is involved such surrender may be sometimes made, probably represents the practice of States. But, subject to a few exceptions, it may be said that extradition now depends on treaty, and will in general only be conceded in the cases and subject to the conditions prescribed by treaty. In view of the fact, moreover, that extradition involves an invasion of the right of asylum, it is, even when conceded by treaty, usually subjected to certain restrictions and safeguards. In some States both the subject of extradition and the international arrangements that may be entered into with respect to it are regulated by municipal law, to which, therefore, all treaties must conform. So, in Great Britain, although the Crown may conclude treaties, yet extradition treaties, for the reason that they derogate from the rights and liberties of the common law, and are also an invasion of the right of asylum, can be carried into effect only under the authority of an Act of Parliament. And in the United States, although treaties duly made constitute in themselves a part of the law of the land, yet such treaties are supplemented by Acts of Congress. With respect to the making of treaties and conventions, it is commonly, although not universally, recognised that, in view of the facilities for escape afforded by modern conditions, there is at any rate a moral obligation incumbent on civilised States not to refuse such conventional arrangements for the surrender of criminals as may be necessary in the common interest of civilised society. Some writers go further and allege that every State has a legal right, although only of an "imperfect" kind, to demand such arrangements at the hands of other States (k). Although extra-

(i) *R. v. Godfrey*, *supra*, p. 253.

(k) Westlake, Chapters, pp. 74, 75.

dition treaties vary somewhat both as regards the offences to which they apply and the procedure to be followed, yet there are certain general principles or conditions which are usually observed both as regards the making and the interpretation of such arrangements: and these may perhaps be said to constitute the germ of a new international usage on this subject. The Institute of International Law, in 1880 and 1892, has also formulated a series of rules on this subject (*l*), while the International Law Association adopted at Warsaw in 1928 a model draft Convention (*m*), Art. 17 whereof is designed to overcome the difficulties at present standing in the way of uniformity.

Political Offences.—The principle that extradition shall not be applied to purely “political” offences is now almost universally followed in extradition treaties (*n*); its general acceptance being largely attributable to the attitude taken up by certain Powers, such as Great Britain, the United States of America, France, Switzerland, and Belgium. But much difficulty exists in determining what constitutes a political offence for the purposes of this exception. Some offences, of course, such as treason, political conspiracy, and seditious libel, are manifestly political. But a political character is often claimed for offences such as homicide and attempts at homicide, by reason of their having occurred in the course of some political movement, or having been prompted by a political motive. The effect of the decision in *Castioni's Case* goes to show that if such an offence was incidental to and formed part of a political disturbance, and if it was done solely with intent to promote the political end in view, then, even though not actually necessary, it will constitute a political offence. But, as was held in *Mcunier's Case*, this will not cover acts directed, not against a certain State or form of government, but against society at large; for the reason that the perpetrators of such crimes are not political partisans, but are, like pirates, the common enemies of mankind. Nor would this exemption extend to acts done in the course of insurrection which even as between enemies would not be permissible under the laws of war. The frequent attempts recently made on the lives of the heads of States have led to the adoption, by a large body of States, of a rule that the murder or attempted murder of the head of a foreign State, or, in the case of a monarch, of a member of his family, shall not be considered as a political offence. Nearly all European States, except Great Britain, Switzerland, and Italy, have now acceded to this view; and even the Government of the United States has concluded treaties to the same effect (*o*). It is probably useless to attempt to provide beforehand such a definition of what constitutes a political offence for this purpose as would meet every

(*l*) An account of these rules will be found in Westlake, i. 244.

(*m*) 35th Report, p. 324: and see Trans. Grothius Soc. vol. xiv, p. 103.

(*n*) A treaty of 1888 between Russia and Spain, however, appears to extend to political offences.

(*o*) Scott and Jaeger, 392 *n*.

conceivable difficulty (p); and the best method of dealing with such questions is probably to leave their determination to the higher Courts of each State, with power to decide each case as it arises and in the light of the special circumstances attending it. Although a State will not surrender political offenders, it is, as has already been pointed out, bound to prevent any abuse of its hospitality, and to adopt all necessary measures for preventing the use of its territory as a centre of active operations against the peace and order of other States.

Deserters.—Some treaties also exempt from extradition military deserters; but in the case of both these and naval deserters the question of surrender appears to be merely one of comity and mutual arrangement. As regards seamen who have deserted from merchant ships, however, the practice of surrender is commonly approved and followed. Thus, in the case of Great Britain it is now provided by the Merchant Shipping Act, 1894, that where it appears that due facilities are given by any foreign State for the recovery of seamen deserting from British merchant ships in its territory, the Crown may by Order in Council bring into force certain provisions of the Act enabling deserters from merchant ships belonging to such State, when within British dominions, to be apprehended and given up (q); and such facilities have now been mutually conceded in a large number of instances.

Extradition Demand must accord with Treaty, and Trial with Surrender.—It is the practice, in framing extradition treaties, to enumerate specifically the offences to which extradition shall apply, such offences being usually of the graver kind; and sometimes also to require that the demand for extradition shall be based on such evidence as would justify committal within the local jurisdiction. This impliedly excludes demands on any other ground; and also involves an obligation, on the part of the demanding State, even though there may be no express stipulation to that effect, not to proceed against the offender for any offence other than that for which he was surrendered, save, perhaps, with the assent of the State effecting the surrender in a case where the offence proposed to be tried was also within the treaty. It also implies an obligation not to surrender him to any other Government.

The Surrender by a State of its own Subjects.—Owing to the claim made by many States to exercise an extra-territorial criminal jurisdiction over their subjects, it has become customary to insert in extradition treaties a clause exempting States from the obligation of surrendering their own nationals. And this exemption is commonly insisted on by the majority of European States, although not favoured, and so far as possible excluded, by Great Britain. This practice is undesirable both because the trial of an offence in any other country than that in

(p) But see Art. 13 of the rules formulated by the Institute of International Law; this is given in Westlake, i. 246.

(q) S. 238, and also ss. 223 and 244.

which it was committed is in itself open to grave objection; and also because, in a case where one of the parties to the treaty follows primarily the territorial principle, it may result in the offender remaining unpunished (*r*). Such an exemption, however, even where it is recognised, will not, it seems, apply where the fugitive has acquired the national character of the State in which an asylum has been sought, after the commission of the offence. Although such a stipulation is invariably reciprocal, Great Britain, in cases where the treaty embodies merely a right of refusal as distinct from a denial of extradition, occasionally concedes the surrender of her own subjects, even though not obligatory (*s*).

Competing Claims.—According to the opinion of some writers and the practice of some States, a demand for extradition may be made not only by the State in whose territory the offence was committed, but also by a State claiming personal jurisdiction over the alleged offender by reason of his nationality. But such claims are not admitted by Great Britain or the United States of America (*t*); and would also seem generally inadmissible on those grounds of principle and convenience which have already been discussed (*u*), save, perhaps, where the offence was committed in a place not within the territory of any civilised State. But in any case, as between competing claims, it would seem that preference should be given to the territorial claim; whilst as between claims equally well founded, it would seem that preference should be given to the claim which involves the graver offence, or, in cases of doubt, to the claim which ranks first in order of time (*a*).

British Extradition Arrangements: (i) *As between the United Kingdom and Foreign Countries.*—The extradition system that now obtains as between Great Britain and other States is based on the Extradition Acts, 1870 to 1932, and on the various treaties which have now been entered into with most civilised States under the authority of those Acts (*b*). The Extradition Acts, in substance, provide: (1) that the Crown may by Order in Council, to be laid before Parliament, apply the provisions of these Acts to such extradition treaties as may be entered into with other States; and (2) that by virtue of such arrangements any person charged with or convicted of any of the offences specified by treaty may be arrested, and surrendered on such evidence as would have justified a committal for trial on a similar charge in England. With respect to the kinds of offences to which extradition may be applied, the general result of the Acts is to admit of nearly all offences being made extraditable, subject to the

(*r*) For an example of this, see *R. v. Wilson*, 3 Q. B. D. 42.

(*s*) As in the case of *De Tourville*, 1876; and this despite 24 & 25 Vict. c. 100, s. 9; see Wheaton (Keith), 227; and Westlake, i. 245 n.

(*t*) See *Carl Vogt's Case*.

(*u*) *Supra*, p. 249.

(*a*) On the subject generally, see Westlake, i. 244.

(*b*) For a list of extradition treaties, see *Encyclopædia Britannica*, vol. 9, p. 2.

limitations in the schedules to the Acts of 1870 and 1873; but under the treaties actually entered into extradition is usually confined to offences of a certain degree of gravity. Thus, by the treaty of 1890, and supplementary conventions, made between Great Britain and the United States of America, extraditable offences include murder, manslaughter, piracy by municipal law, arson, robbery, forgery, burglary, embezzlement, malicious injury endangering life, larceny of property of the value of £10, and bribery. The limitations imposed on extradition are these: (1) no person is to be surrendered for "political offences"; (2) no person is to be surrendered unless provision is made by the law of the State requesting surrender, or by arrangement, that he shall not be tried for any offence committed prior to his surrender, other than the crime proved by facts on which the surrender took place, unless he has previously had an opportunity of returning to the country which surrendered him; (3) no fugitive criminal who at the time when his surrender is requested is undergoing punishment for an offence committed within the British jurisdiction is to be surrendered until discharged; and (4) no person is to be surrendered until the expiration of fifteen days from the date at which he was committed for the purpose of surrender (c). The procedure in the United Kingdom in cases of extradition is shortly as follows: A requisition for surrender is made by the diplomatic representative or Consul-General of the demanding State, whereupon the Secretary of State issues an order to one of the Bow Street police magistrates requiring him to issue a warrant of arrest. This warrant is to be issued on receipt of such order, and on such evidence as would justify an arrest under the local law; and may then be executed in any part of the United Kingdom. If the fugitive is arrested the case is heard before the magistrate, and if the evidence is such as would warrant a committal in England, the prisoner is committed under the Act; this fact being reported to the Secretary of State. The prisoner has then fifteen days within which to apply for a writ of *habeas corpus*, of which fact he must be duly informed. After this the Secretary of State may issue his warrant of surrender. If not surrendered within three months the prisoner is entitled to his discharge (d).

A curious point arose in the *Savarkar Case* between France and Great Britain in 1911. Savarkar, a British subject, charged with high treason and with being accessory to a murder, whilst being transported to India escaped ashore at Marseilles, was seized by a French policeman, and, without any formalities, handed back to the British authorities on board the ship from which he had fled. It was found by the Permanent Court of Arbitration of The Hague that, although an irregularity had been committed, there is no rule of international law imposing, in circumstances such as these, any obligation on the Power which has in its custody a prisoner, to restore him because

(c) See Act of 1870, s. 3; and for a criticism, Stephen, *History of Criminal Law*, ii. 69.

(d) For variations in this procedure, see Stephen, *Digest of Criminal Procedure*, p. 100 *et seq.*

of a mistake committed by the foreign agent who delivered him up to that Power (e).

In support of this common-sense award it may be urged that the master of the ship was entitled to assume that the local police acted with authority.

(ii) *As between other British Possessions and Foreign States.*—Inasmuch as extradition now depends on treaty, and inasmuch as treaties can only be entered into by the sovereign authority, it follows that any system of extradition obtaining between other parts of the British possessions and foreign States must depend on arrangements made by the imperial Government (f). As a matter of fact, all extradition treaties recently entered into between Great Britain and foreign States have been made applicable to colonies and dependencies. The provisions of the Extradition Acts, upon which the operation of such treaties depends, also apply to all British possessions, except in so far as may otherwise be provided by Order in Council, and saving certain necessary modifications in the matter of procedure which are provided for by the Act itself. Where a foreign criminal has taken refuge in a British possession, a requisition for his surrender may be made to the Governor, either by a consular officer of the demanding State, or, if the fugitive has escaped from a foreign colony or dependency, then by its Governor; thereafter the procedure followed is much the same as in the United Kingdom; whilst the warrant for surrender is issued by the British Governor subject to a similar right on the part of the person charged to challenge the legality of the surrender (g). It is provided, however, by the Act, that in the event of the legislature of any British colony or dependency passing any law of its own for the surrender of fugitive criminals, the Crown may suspend the provisions of the imperial Act, either in whole or in part, or may direct that the local law shall take effect, either with or without modification, as if it were part of the imperial Act (h).

(iii) *As between different Parts of the Empire.*—The complex organisation of the British Empire, and the fact that it is made up of different countries or areas, each of which possesses its own legal and judicial system, has necessitated the adoption of domestic arrangements for ensuring the arrest and surrender of fugitive offenders, as between its different parts. (1) *As between different parts of the United Kingdom*, provision is made, although under a great variety of statutes, for the execution in one part of warrants of arrest issued in another, subject to their being locally endorsed by the proper judicial

(e) Scott, *Hague Court Reports*, 275.

(f) Treaty making power is possessed by the British Dominions.

(g) See Extradition Act, 1870, s. 17; and 1895, s. 2.

(h) See Extradition Act, 1870, s. 18.

or other officer (i). (2) As between the United Kingdom and other British possessions or countries to which the Foreign Jurisdiction Acts have been applied, and also as between such possessions or countries themselves, the arrest and surrender of fugitive offenders is provided for by the Fugitive Offenders Act, 1881. (3) Finally, where a dominion or dependency comprises different States or provinces, which in other respects constitute separate legal or judicial units, domestic extradition is commonly provided for by the federal or other common legislative authority (k). By the Fugitive Offenders Act, 1881, a person charged in one part of the British dominions with any offence punishable on conviction with imprisonment for twelve months or more, with hard labour, may be arrested in another part under a warrant locally endorsed; whilst a person who is suspected of having committed any such offence may also be arrested under a provisional warrant issued locally; and in either case the person so arrested may, after an investigation before a magistrate, and on the production of evidence affording a reasonable presumption of guilt, and subject also to such a period of delay as may enable him to challenge the legality of the proceedings, be ordered to be surrendered, and thereafter be returned to that part of the dominions from which he has escaped (l). By Part II of the Act, moreover, proceedings of a somewhat simpler character are provided for groups of contiguous colonies, subject to their being made applicable by Order in Council (m).

EXTRA-TERRITORIAL COMMUNITIES—FOREIGN JURISDICTION

PAPAYANNI v. THE RUSSIAN STEAM NAVIGATION COMPANY

(1863), 2 Moo. P. C. N.S. 161.

A COLLISION had taken place, off the island of Marmora, between the “Laconia”, a steamship belonging to the appellant, a British subject domiciled in England, and the “Colchida”, a steamship belonging to the respondents, a Russian company, in the course of which the “Colchida” had been sunk. An action *in rem* was then brought by the owners of the “Colchida” in

(i) For a summary of the statutes on this subject, see the *Encyclopædia of the Laws of England*, 2nd ed., vi. 180.

(k) As in the Commonwealth of Australia, by the Service and Execution of Process Act, 1901, s. 18.

(l) See the Fugitive Offenders Act, 1881, Part I, especially ss. 1, 2, 3, 26.

(m) As to the extent to which this part of the Act has been made operative, see *Encyclopædia of the Laws of England*, 2nd ed., vi. 180 *et seq.*

the Consular Court of Constantinople, in which they claimed damages for losses alleged to have been sustained by reason of the negligence of those on board the "Laconia". The owners of the latter entered a protest against the jurisdiction of the Court to entertain the suit, on the ground of its being a proceeding *in rem*; and, upon this being overruled, they instituted a cross-action against the owners of the "Colchida". At the trial, and on the evidence, the Consular Court found both vessels in fault; and, acting on the rule of the English Court of Admiralty, adjudged that each party should bear a moiety of the aggregate loss sustained, but without costs. From this decision and from the judgment affirming jurisdiction the present appeals were brought to the Privy Council. In the result the Judicial Committee held: (1) that inasmuch as jurisdiction had customarily been exercised in such proceedings, the cause was one which properly fell within the jurisdiction of the Consular Court; and (2) that, on the merits, both actions should be dismissed, each party paying his own costs.

Judgment.] In delivering judgment, Dr. Lushington pointed out that although in general no State could claim jurisdiction within the territorial limits of another independent State, and although as between Christian States such a claim could not be supported except by treaty, yet a great difference existed in respect of Oriental nations; and that the same rule did not necessarily apply within the dominions of the Porte. In such cases, quite apart from treaty, a privileged jurisdiction might well be supported by constant usage, wittingly acquiesced in by the local authorities. In the present case, if any objection to the jurisdiction were taken, it ought to be taken by the Ottoman Government, and not by a British subject. But in fact such a jurisdiction had long been exercised and acquiesced in. At first grave differences in religion had made it necessary to withdraw British subjects from the native Courts; in time and with the progress of commerce, and Western nations having the same interest in abstaining from Mussulman tribunals, recourse was had to the Consular Courts; whilst finally the system became general. The acquiescence of the Ottoman Government proved its consent. But although the Porte had given the Christian Powers authority to administer justice to their own subjects, it could not give one Power jurisdiction over the subjects of

another. Still, it had left them at liberty to deal with each other as they might think fit; and if the subjects of one Power desired to resort to the tribunals of another, there was no objection to their doing so by mutual consent. Hence, although a British Court in Turkey could not exercise compulsion over any but British subjects, yet a foreign subject might, if he chose, voluntarily resort to it, with the consent of his Sovereign, and thereby submit himself to its jurisdiction. The exercise of such a jurisdiction in foreign countries was provided for by the Foreign Jurisdiction Act, 6 & 7 Vict. c. 94, s. 1, which, after reciting that her Majesty had, by treaty, capitulation, grant, usage, sufferance, or other lawful means, power and jurisdiction in divers countries and places out of Her Majesty's dominions, and that doubts had arisen as to how far such jurisdiction was controlled by the laws of the realm, enacted, in effect, that such jurisdiction might be exercised in the same and as ample a manner as if it had been acquired by the cession or acquisition of territory. So the British consular jurisdiction in the Ottoman dominions, in so far as it existed by usage or sufferance, must be deemed to be regulated by the Orders in Council which had been passed in pursuance of that Act. The Order in Council of August 27, 1860, s. 64, amongst other things, empowered the Supreme or other Consular Court, according to its jurisdiction, and in conformity with the rules regulating suits between British subjects, to hear and determine any suit of a civil nature between a British subject and a subject of the Porte or of any other friendly State, provided that the latter obtained and filed in Court the consent in writing of some competent local authority or of the consul of his State, as the case might be, to his submitting to the jurisdiction, and did actually submit to the same, and gave security if required. In the present case the respondents had complied with the conditions, and did not now question the jurisdiction. It was not, therefore, competent to the party who, as a British subject was by law subject to such tribunal to raise any such objection.

This case is cited mainly as illustrating the nature and origin of that extra-territorial jurisdiction exercised by Christian States over their subjects whilst residing within the borders of certain non-Christian States, and which led to the establishment of those extra-territorial communities which will be described hereafter (*n*). It further serves to illustrate the conditions under which such "foreign" jurisdiction may be exercised under the English law; and more especially the necessity of obtaining the consent of a foreign State before such jurisdiction can be exercised over its subjects. From the point of view of English law the term foreign jurisdiction may be used in two senses: (1) It may be used to indicate that jurisdiction which Great Britain in certain cases asserts over her subjects when outside British territory, and even when within the territory of a civilised State (*o*). (2) It is, however, commonly used in a more restricted sense, to denote that jurisdiction—more limited as regards the cases to which it applies, but more complete and effective when it does apply—which is exercised over British subjects or those classed with them, when resident in certain non-Christian States, or in countries not possessing any civil Government. Such a jurisdiction may be acquired either by treaty, usage, or sufferance; but as between the Crown and its subjects, the exercise of such a jurisdiction is now regulated by the Foreign Jurisdiction Act, 1890, and the various Orders in Council passed or maintained under its authority (*p*). In addition to the general Act there are various special Acts which authorise and regulate the exercise of foreign jurisdiction within particular areas (*q*). Such foreign jurisdiction is exercised, according to the terms of the Order in Council, either by judicial officers, or by consular officers, or by naval and military officers, or by commissioners.

The Doctrine of Exterritoriality.—The exclusive jurisdiction of every State within its own territory is subject, both on its positive and negative side, to certain exceptions. Exterritoriality is a legal fiction by which certain persons, places and things are deemed, for the purposes of jurisdiction and control, to be outside the territory of the State in which they really are, and within that of some other State, the jurisdiction of which is to that extent enlarged. Its principal applications in international law are to (1) Sovereigns, whilst travelling

(*n*) *Infra*, p. 277.

(*o*) As where it claims from its subjects the duty of allegiance wherever they may be resident; or where it prescribes penalties for acts done by them abroad—24 & 25 Vict. c. 100, s. 9; or when it assumes to determine the validity of acts done abroad—24 & 25 Vict. c. 114.

(*p*) See Hall, *Foreign Jurisdictions*, Index of Orders, p. 298.

(*q*) Such as 26 & 27 Vict. c. 35 (now revocable by Order in Council), in relation to certain parts of South Africa; and 35 & 36 Vict. c. 19, and 38 & 39 Vict. c. 51, as to the islands of the Pacific. See Hall, *Foreign Jurisdiction*, p. 230.

or resident in foreign countries; (2) Ambassadors and other diplomatic agents (and suite) having a representative character, and their official residences; (3) Public vessels, whilst in foreign ports or territorial waters; (4) The armed forces of a State, when passing through foreign territory; and (5) Foreigners of European or American extraction, when resident in certain Eastern States.

Extra-territorial Communities.—In the case of non-Christian countries, European Governments from a comparatively early time found it necessary, owing to differences of religion and culture, and more especially owing to the barbarous methods of procedure and punishment which then prevailed, to withdraw their subjects from the local jurisdiction. In the case of Turkey this exemption was originally founded on the Capitulations. These were treaties made by the Crown with the Sultan, which provided that all disputes between British subjects should be left to the decision of the ambassador or consuls; and that if a British subject were accused of crime or sued civilly by an Ottoman subject the case should not proceed unless some British official were present in Court. They also conferred certain exemptions with respect to the arrest of the persons, the entry of the houses, and the taxation of the property of British subjects. Similar treaties were made from time to time by the Sultan with other European States; with the result that a complete system of extra-territorial jurisdiction was gradually established, extending in many respects beyond the original grants, but sanctioned by long usage and acquiescence (*r*). This system, which originated in the dominions of the Porte, including Egypt, was afterwards extended by treaty or convention to other non-Christian countries. The result was to establish "extra-territorial" communities, consisting of persons who, whilst resident in the territory of the local Power, are yet deemed for the purposes of civil and criminal jurisdiction, and sometimes even for the purposes of taxation, to be outside its borders, and resident within their own country. Such persons continue subject to the law of the country of which they are nationals; such law being administered by their consul or other authority appointed by their own Government. This jurisdiction came to an end in Japan in 1899, in Turkey in 1923, in Siam in 1927 and in Persia in 1928. The system of extra-territorial jurisdiction occupies a place in international law both in so far as it constitutes an exception to the ordinary rule of territorial supremacy, and in so far as it affects the position of consuls, who in such countries are commonly invested by treaty both with diplomatic privileges and judicial functions.

Consular Jurisdiction Generally.—The privilege of exemption from jurisdiction granted by the Capitulations and by other treaties carried with it an implied obligation on the part of the States enjoying these

(*r*) For an interesting account of the origin of this system, the difficulties that arose on the abolition of the Levant Company, and the passing of the Foreign Jurisdiction Act, 1843, see Jenkyns, *British Rule*, etc., pp. 148, 248 *et seq.*

privileges to make some provision under their municipal law for the punishment of crimes committed by, and for the determination of civil disputes arising between, their subjects. In general this obligation was met by conferring a jurisdiction, both civil and criminal, in the first instance, on the consuls by which such States were locally represented; with power, however, in graver cases, to send offenders home for trial, or to refer the matters to the home Courts. Hence it followed that, in such countries, consuls, being not merely exempt from the local jurisdiction, but also positively invested with a jurisdiction over others, and possessing also other immunities conferred on them by treaty, as well as extensive powers of intervention and protection, came in fact to enjoy something of the diplomatic character and its attendant privileges; a character and position which they do not enjoy when residing in civilised States (s). Their consulates came to be regarded as extraterritorial, and the consuls themselves as international representatives of their States rather than commercial agents. The consuls also claimed the right of determining what persons were under their protection, and of granting protection to strangers irrespective of origin or nationality; a privilege which gradually won its way to recognition, but which is often greatly abused (t).

THE PUBLIC VESSELS AND ARMED FORCES OF A STATE

(i) SHIPS OF WAR

THE "EXCHANGE" v. MCFADDON

(1812), 7 Cranch. 116.

IN December, 1810, while on a voyage from Baltimore to St. Sebastian, the "Exchange", then the property of two American citizens, was seized by order of the Emperor Napoleon. She was thereupon converted at Bayonne into a man-of-war, and commissioned as a public vessel of the French Government, under the name of the "Balaou". In this character she subsequently put into the port of Philadelphia, whereupon proceedings were instituted against her with the object of procuring her restoration to her former owners. In the District Court the proceedings against the vessel were dismissed on a suggestion, filed on behalf of the executive Government, that the vessel as a public vessel belonging to a foreign Government,

(s) *Infra*, pp. 344-9.

(t) Westlake, i. 199, 200; and Wharton, i. pp. 791, 801.

was exempt from the local jurisdiction. In the Circuit Court this judgment was reversed. But on appeal to the Supreme Court the judgment of the District Court was affirmed, and the proceedings against the vessel were dismissed.

Judgment.] Marshall, C.J., in giving judgment, after pointing to the dearth of authority in the shape either of precedent or written law, stated that the jurisdiction of every nation within its own territory was necessarily exclusive and absolute, and was susceptible of no limitation that was not imposed with its own assent; for the reason that any restriction deriving its validity from an external source would imply a corresponding diminution or transfer of its sovereignty. Any exception to the full and complete power of a nation within its own territory must be traced to the assent of the nation itself.

Such an assent, however, might be either express or implied; if it was only implied, then it might indeed be less determinate, but if understood it was not less obligatory. Such an assent might in some instances be evidenced by common usage, and by common opinion growing out of that usage. The mutual equality and independence of Sovereigns, and their common interest, had given rise to a class of cases in which every Sovereign was understood to waive the exercise of a part of his exclusive territorial jurisdiction. One of these cases was admitted to be the exemption of the person of a Sovereign from arrest and detention when within a foreign country. A second case, standing on the same principles, was the immunity which all civilised nations allowed to foreign Ministers. A third case in which a Sovereign was understood to waive a portion of his territorial jurisdiction was where he allowed the troops of a foreign prince to pass through his dominion. In such a case the grant of passage, if expressly conceded, implied a waiver of jurisdiction; for otherwise the military force of a foreign independent nation might be diverted from its national objects and withdrawn from the control of its Sovereign. Moreover, even if there were no special licence, but only a general permit, it would seem that a similar waiver of jurisdiction must necessarily follow. It was true that the passage of an army through foreign territory was at all times inconvenient, and might often be dangerous to the local Power; and for this reason a general licence to foreigners to enter the dominions was never understood

to extend to a military force, for whose entry in time of peace a special licence was therefore required.

But this rule, applicable to armies, did not appear to be equally applicable to ships of war entering the ports of a friendly Power; for the reason that such entry was not attended by similar inconvenience or dangers. Hence in such cases no special licence was required. If for reasons of State it was desired to close the ports of a nation or any particular ports against vessels of war generally, or against the vessels of any particular nation, express notice was usually given. In default of such prohibition the ports of a friendly nation were considered as open to the public ships of all Powers with which it was at peace. In some cases, indeed, such a right was conferred expressly by treaty, and in such a case the same immunity from local jurisdiction which was conferred by special licence in the case of armed forces would certainly attach to public vessels; but even if there were no treaty, yet if a Sovereign permitted his ports to remain open to the public ships of friendly Powers, the conclusion seemed irresistible that they entered by his assent.

It was true that the same privilege, whether conceded expressly by treaty or implied from the absence of express prohibition, extended also to the case of private vessels; and it might on this ground be urged that public vessels were therefore in the same condition as merchant vessels entering for trade purposes, and that they, like the latter, became subject to the local jurisdiction. But it appeared to the Court that in such cases a clear distinction was to be drawn between the rights accorded to private trading vessels and those accorded to public armed ships. A public armed ship constituted a part of the military force of her nation; she acted under the immediate and direct command of the Sovereign, and was employed by him for national objects. Hence she could not be interfered with without affecting his power and his dignity. The implied licence, therefore, under which such a vessel entered a friendly port might reasonably be construed, and, as it seemed to the Court, ought to be construed, as containing an exemption from the jurisdiction of the Sovereign within whose territory she claimed the rights of hospitality.

Adverting to an opinion expressed by Bynkershoek, that the property of a foreign Sovereign was not distinguished by any

legal exemption from that of an ordinary individual, the Chief Justice, without expressing any opinion on that subject, pointed out that there was a manifest distinction between the private property of a person who happened to be Sovereign and that military force which supported the sovereign power and maintained the dignity of the nation. In the former case a Sovereign, by acquiring property in a foreign country, might possibly be considered as subjecting it to the territorial jurisdiction, but he could not be presumed to do this as regards any portion of the armed force of the nation.

It must therefore be concluded that it was an undoubted principle of public law that national ships of war entering the ports of a foreign Power open for their reception were to be considered as exempted, by consent of that Power, from its jurisdiction. The Sovereign of the place could no doubt destroy such an implication; but until that was done in a manner not to be misunderstood, he could not be considered as having imparted to the ordinary tribunals a power which it would be a breach of faith to exercise.

As to a contention that it was the duty of the Court to inquire whether the title of the original owners had been extinguished by an act recognised as valid by the municipal law, it was held that the ship must be considered to have come into American territory under an implied condition that, while necessarily within it and demeaning herself in a friendly manner, she should be altogether exempt from the local jurisdiction.

This case serves to illustrate the general rule with respect to the immunity of the armed forces or the public vessels of one State when within the territorial limits of another. It may probably be regarded as the leading case on this subject; and the decision is all the more weighty for the reason that the title of the foreign Sovereign in this particular case was notoriously wrongful. Despite this it was held that the title of such foreign Sovereign could not, according to the accepted principles of public law, even be inquired into (u). The judgment, it will be seen, clearly upholds the exclusive sovereignty of every State within its own territory; and therefore bases the exemption both of armed forces and public vessels, when within the limits

(u) For a more recent case in which immunity was recognised in the case of ships alleged to have been wrongfully seized, see *National Navigation Company of Egypt v. Taroulaudis*, 1927 (Annual Digest, 1927-8, No. 110).

of a foreign State, on an express or implied assent on the part of the latter to waive that control and jurisdiction which would otherwise belong to it. The qualification, "and demeaning herself in a friendly manner" probably means no more than that if a public vessel were to commit some palpable act of hostility here immunity would be at an end and she would be liable to be treated as an enemy. As has already been pointed out, the "public" property of a foreign Sovereign or State, whatever its nature, is, by virtue of its public character alone, exempt from the local jurisdiction: but in the case of public vessels forming part of the armed forces of a State this exemption goes further, and extends to both vessel and crew and other persons on board, as constituting an instrument of State and a part of the national machinery. And the same principle has now been fully recognised by the English Courts.

In the case of the *Constitution* (1879), 48 L. J. P. D. & A. 13; L. R. 4 P. D. 39, proceedings were taken in the Admiralty Division to obtain warrants of arrest against the vessel and the cargo on board, in order to recover compensation for salvage services rendered to her by the steam tug *Admiral*, at a time when the *Constitution* was stranded on the English coast. At the hearing both the Crown and the American Legation were represented, and the Court was informed that the *Constitution* was a public vessel commissioned by the United States and employed on the public service. She was at the time engaged in carrying back to America certain goods belonging to American exhibitors at the Paris Exhibition; and the salvors contended that the cargo, being private property, was not at any rate entitled to any privilege. It was held, however, that a ship of war belonging to a nation with which Great Britain was at peace was exempt from the local jurisdiction of the British Courts; and further that no distinction could be drawn between proceedings against the ship and proceedings against the cargo, in a case where the latter was found on board a foreign vessel of war and under the charge of a foreign Government for public purposes.

Prior to this decision some doubt appears to have existed as to whether salvage proceedings might not be instituted in the English Court of Admiralty against a public vessel (a). The same principle appears to be recognised by the municipal law and followed by the Courts of other States. "The sound and true exposition of the law on this point is that a public ship of war belonging to a State with which amicable relations exist is exempt from the jurisdiction of the State in whose territorial waters she may happen to be" (b).

(a) See *The Charkich*, 4 A. & E. 59.

(b) Phillimore, i. 481.

(ii) PUBLIC VESSELS OTHER THAN SHIPS OF WAR

THE "PARLEMENT BELGE"

(1880), 5 P. D. 197.

IN this case proceedings were commenced in the Admiralty Division against the "Parlement Belge", for the purpose of recovering damages in respect of a collision which had occurred in Dover Harbour between that vessel and the steam tug "Daring". In the course of these proceedings, and no appearance having been entered on behalf of the vessel, it was sought to issue a warrant of arrest against the "Parlement Belge"; but to this a protest was entered on behalf of the Attorney-General, asserting that the Court had no jurisdiction to entertain the suit, on the ground that the vessel was the property of the King of the Belgians, and was therefore entitled to be treated as a public vessel of the State. It appeared that the "Parlement Belge" was a mail packet running between Ostend and Dover, and employed in a service which was the subject of a convention made in 1876 between Great Britain and Belgium; that she was the property of the King of the Belgians and carried the royal pennon; and that she was at the time in the possession and employment of the Government and under the charge of officers holding commissions in the Belgian navy; although in fact carrying merchandise and passengers, for hire, in addition to the mails. In the lower Court this protest was overruled; but on appeal this judgment was reversed and the vessel held exempt from the local jurisdiction.

Judgment.] Brett, L.J., in delivering the judgment of the Court of Appeal, after referring to the facts, observed that the first question was whether the Court had power to proceed against a ship which, though present in this country, was at once the property of a foreign Sovereign and in his possession and control—which was also a public vessel of the State in the sense of being used for purposes treated as public national services—but which, although commissioned, was not an armed ship of war, or employed as a part of the military force of the country. On this point the Court laid it down as a principle deducible from the authorities that every State declined to exercise by means of any of its Courts territorial jurisdiction over

the person of the Sovereign or ambassador of any other State, or over the public property of any State which was destined to its public use, including its public vessels, or over the property of any ambassador; even though such Sovereign, ambassador or property might be within its territory. It was held, moreover, that in such cases the immunity so established could not be defeated by the adoption of proceedings *in rem*, directed merely against the property; for the reason that by such proceedings the owner of the property was nevertheless indirectly impleaded and affected by the judgment of the Court. The effect of such a proceeding against the property of a foreign Sovereign was, in fact, to call upon him either to sacrifice his property or his independence; and to place him in that position was virtually a breach of the principle upon which his immunity from jurisdiction was based.

The second question was whether such immunity had been lost by reason of the ship having been used for trading purposes. As to this, it must be maintained either that the ship had been so used as to have been employed substantially as a mere trading ship, and not substantially for national purposes; or else that a use of her in part for trading purposes took away the immunity, even though she remained in the possession of the sovereign authority by the hands of commissioned officers and was substantially in use for national purposes. As to the first of these contentions, the ship in the present case had been declared by the Sovereign of Belgium to be in his possession, and to be a public vessel of the State. It was difficult to see how any Court could inquire into the correctness of such a declaration without bringing the Sovereign under its jurisdiction. It has been held, moreover, in the case of the "*Exchange*", that if a ship were declared by the sovereign authority by the usual means to be a ship of war, that declaration could not be inquired into; and the question whether a public ship, not being a ship of war, was used for national purposes appeared to come within the same rule. But, even if such an inquiry could be instituted, it seemed to the Court in the present case that the ship had been mainly used for the purpose of carrying the mails and only subordinately for trading purposes, and hence that she did not fall within the first contention. As to the second, it had been frequently stated that an independent Sovereign could not be sued personally, even

though he might have carried on a private trading venture; and the same rule applied to an ambassador; for the reason that in either case such a suit would be inconsistent with the independence and equality of the State which such Sovereign or ambassador represented. In the present case, however, it appeared to the Court that the ship had been used only subordinately and partially for trading; and that this did not take away her general immunity.

This case serves to show that, from the point of view of the English Courts, the fact that a vessel belonging to a foreign Sovereign having been used subordinately for trading purposes will not forfeit her right to treatment as a public vessel. In spite, however, of some expressions used in the judgment—which on the facts as found were not necessary to the decision—it would seem on principle that if such a vessel were used wholly as a trading vessel, and had passed out of the possession and control of the Sovereign, then this privilege would no longer avail; for the reason that the Sovereign in such a case must be deemed to have voluntarily abandoned for the time being her “public” character, whether as an instrument of State or as property. At the same time, the effect of this is somewhat qualified by the rule that, on the question of “public” character, the declaration of the foreign Sovereign will ordinarily be treated as conclusive (c).

In the *Jussy*, [1906] P. 270, it was held that process by way of arrest, in an action *in rem* for damage, would not lie against a vessel belonging to a foreign sovereign State (Roumania) and destined to its public use; and that upon an application by its Government and the production of a certificate from the Foreign Office as to its public character all proceedings would be stayed. It was further held that the fact of the local agents of the ship having under a misapprehension, and in order to procure her release, entered an absolute appearance did not constitute a submission to the local jurisdiction.

In the *Gagara*, [1919] P. 95, the Court refused jurisdiction on the statement of the Attorney-General that the Government had recognised the National Estonian Council as a *de facto* independent Government.

In the *Porto Alexandre*, [1920] P. 30, it was held by the Court of Appeal, affirming Hill, J., that a sovereign State could not be impleaded either by being served *in personam* or indirectly by proceedings against its property, and if that were the principle it mattered not how the property was being employed. In this case the vessel (formerly German-owned) was being employed in ordinary trading voyages, earning freights for the Portuguese Government, by which she had been requisitioned.

Both Lord Thankerton and Lord Macmillan in their judgments in *The Compania Naviera Vascongado v. S.S. Cristina*, [1938] A. C. 485, at pp. 496–8, expressed doubts as to this case. See also Lord Maugham, at p. 519.

(c) But see p. 290, *infra*.

Lord Wright appears to have been in favour of immunity in this case. In the *Cristina* these opinions are merely *obiter dicta*, but the point whether a public ship engaged in an ordinary trading voyage has the usual immunities accorded to public ships appears to be not entirely settled. The increase in the private trading activities of States, and the position, in particular, of States such as Soviet Russia, whose mercantile marine has been nationalised, has forced this problem to the front.

A Convention signed at Brussels in 1926 embodies the principle that in time of peace State-owned ships engaged in commerce should have no immunity. This was in force between nine States in 1937 (Oppenheim, i. 670), and shows the prevailing tendency against the existence of special immunity in this case. In fact, apart from arguments based on State dignity and prestige, considerations which have played too great a part in international controversies in the past, the granting of immunity to such ships engaged in private trade has little to commend it.

In the case of public armed vessels or vessels definitely engaged in public duties, considerations of a different character arise.

(iii) PERSONS ON BOARD PUBLIC VESSELS

THE "SITKA"

(1855), Opinions of U.S. Attorneys-General, vii. 122.

IN 1856, during the Crimean War, the "Sitka" a Russian ship, was captured by a British man-of-war, and brought into San Francisco with a prize crew on board. An application for a writ of *habeas corpus* was made to the Californian Courts on behalf of two prisoners on board for the purpose of trying the validity of their detention; and the writ having been issued, was thereupon served on board the "Sitka". This proceeding, however, was ignored by the commander of the "Sitka", who got under way and left the port with the prisoners on board.

Opinion.] The United States Government being in doubt as to whether a cause of complaint had not arisen against Great Britain, the opinion of Mr. Cushing, the Attorney-General of the United States, was taken on the question. In his opinion, Mr. Cushing pointed out that judicial decisions had settled the point that, except where there had been a violation of its neutrality, as in the case of the "Santissima Trinidad", the Courts of a neutral State had no jurisdiction to decide on the validity of a capture made by a belligerent. He also pointed out that the Courts of the United States had adopted almost unequivocally

the doctrine that a public ship of war of a foreign Sovereign at peace with the United States, coming into her ports and demeaning herself in a friendly manner, was exempt from the jurisdiction of the country and remained a part of the territory of her Sovereign. The ship in the present case, therefore, must be regarded as a part of the territory of the Sovereign into whose possession she had passed; and as this was threatened with invasion by the local Courts, it was not only lawful, but highly discreet, in the captain to depart, and thus avoid unprofitable controversy.

This case is cited as illustrative of the rule that in the case of a public vessel not only is the vessel herself exempt from the local jurisdiction when within the Courts of another State, but that no process emanating from the local Courts can be served on board her, in relation either to her officers or the members of her crew or other persons on board. It is true that in the present case the vessel was only a prize, which is not strictly entitled to the privileges of a public vessel, and which, moreover, is in certain circumstances, as where she has been captured in violation of the local neutrality, admittedly subject to the local jurisdiction (*d*). Nevertheless, even a prize, if permitted to enter foreign ports or harbours, will in other respects share the privileges of a public vessel, as being the public property and under the control of the captor State. And the opinion is given, as will be seen, on the basis of the *Sitka* constituting a part of the territory of the State to which she belonged, in the same way as if she had been a public vessel. Hence the principle enunciated may be taken to apply to public vessels generally. In certain earlier cases, indeed, both in 1794 and 1799, a different view appears to have been entertained by the legal advisers of the United States Government (*e*). But this was before the decision of the Supreme Court in the case of *The Exchange v. McFaddon* (*supra*), and also before the general usage on this subject had taken on its present shape. At any rate, the opinion given in the case of *The Sitka* appears to represent the modern and true view of the matter; although it needs to be taken subject to certain qualifications which attach in time of war, and which will be more fully considered hereafter (*f*).

(*d*) *Infra*, vol. ii.

(*e*) See Wharton, Dig. i. 138; Opn. U.S. A.-G. i. 47, 87 *et seq.*

(*f*) Vol. ii. *sub nom.* Neutrality.

CHUNG CHI CHEUNG v. THE KING

108 L. J. P. C. 17: [1939] A. C. 160.

CHUNG Chi Cheung, a British subject, cabin boy on the Chinese maritime Customs cruiser "Cheung Keng", a foreign armed public ship, while the ship was in the territorial waters of Hong Kong on January 11, 1937, shot and killed the captain. The acting chief officer, who was himself wounded in the affray, ordered the ship into Hong Kong and called in the police to arrest the accused. As the accused was a British subject, extradition proceedings proved impracticable. He was therefore rearrested, tried by the Court of Hong Kong, and sentenced to death. Appeal was taken from the full Court of Hong Kong to the Privy Council.

The appellant contended that as the ship on which the offence had been committed was the public property of the Chinese Government, it was a floating part of the territory of China, and there had been no waiver of immunity by the Chinese Government. The immunity to which the ship was entitled included the crew, and could not be waived by the acting chief officer without higher authority.

Judgment.] Lord Atkin, delivering the opinion of the Judicial Committee, held that a public ship of a nation is not, and is not to be treated by other nations as, part of the territory of the nation to which she belongs. The true theory is that the domestic Courts, in accordance with the principles of international law, accord to the ship and its crew and its contents certain immunities, some well settled, others in dispute. Those immunities are conditional and can in any case be waived by the nation to which the public ship belongs. On examining the authorities on the immunities of public ships as accepted by our Courts, the Court had no hesitation in rejecting the doctrine of extritoriality which regards the public ship as a floating portion of the flag State. In whatever way the doctrine of extritoriality is expressed, it is a fiction, and legal fictions have a tendency to pass beyond their appointed bounds and to harden into dangerous facts. The immunities recognised by the local Courts in this type of case flow from a waiver by the local Sovereign of his full territorial jurisdiction, and can themselves be waived—in which case the original jurisdiction returns. The

Chinese Government in this case had clearly consented to the exercise of jurisdiction. With full knowledge of the proceedings, not only did they make no further claim, but they permitted four members of their service to give evidence for the prosecution. Hence, the Courts of Hong Kong had jurisdiction and the appeal must fail.

The Court in this case rejected the extreme view of the doctrine of extritoriality which regarded a public ship as a floating portion of the flag State. Whilst recognising the completeness of the immunities granted in practice to such ships, it bases such grant on waiver by the territorial sovereign of his jurisdiction. Waiver in this instance does not, however, imply an abstention from the exercise of jurisdiction revocable at will—it means that by virtue of the accepted rules of international law crimes committed on board a public armed ship while in a foreign port are outside the local jurisdiction, except where action is taken with the consent of the commanding officer of the ship. The recognition of the doctrine of extritoriality as a fiction, convenient, perhaps, as an explanation of existing immunities, but not to be pressed as a fact to its strict logical conclusions, seems to be securing general assent both in Great Britain and elsewhere.

In the case of *The Sitka*, *supra*, p. 286, the doctrine appears to have been stated in rather less guarded terms than present day tendencies would accept.

What Constitutes a "Public Vessel".—A public vessel is one owned and commissioned by the Government of a Sovereign State; or even, it seems, by the Government of a semi-Sovereign State, so long as the latter is recognised externally as a separate international person (g). In the category of public vessels are included not only ships of war, but also unarmed Government vessels, store ships, and transports. The view adopted by the English Courts that a subordinate or partial use of a public vessel for trading purposes, so long as she remains under the control of the State to which she belongs and in charge of its officers, will not disentitle her to the privileges of a public vessel (h), would probably be followed by the Courts of other States. It is also necessary to bear in mind that the public property of one State, whatever its character, is, when within the territorial limits of another State, regarded as exempt from local jurisdiction, irrespective of its constituting an instrumentality of the State (i).

On the wider question of the immunity of public ships engaged wholly in private trading ventures there is more room for doubt. *The Porto Alexandre*, [1920] P. 30 and *The Jupiter*, [1924] P. 236 are

(g) See *The Charlieh*, 4 A. & E. at 77.

(h) *Supra*, p. 285.

(i) *Briggs v. Light Boats*, 11 Allen, 157; Hall, 252.

authorities in favour of immunity in English law, and despite the doubts expressed by several law lords (*supra*, p. 285) in the case of *The Cristina*, in view of the accepted principle that a foreign State cannot be impleaded without its consent, in English law the balance seems to be in favour of immunity. The decision of the U. S. Supreme Court in *Berizzi Bros v S.S. Pesaro*, 271 U. S. 562; *Hudson Cases* 530, where a ship owned and controlled by the Italian Government was employed solely in commercial ventures for the benefit of the Italian nation, was in favour of immunity. For a French acceptance of the immunity of a Soviet merchant ship engaged in private commerce, see *Socrifios v. Union of Socialist Soviet Republics*, Court of Appeal of Aix, 1938, Annual Digest, 1938-40, No. 80, p. 236. But the inconvenience of the recognition of immunity in such cases is increasingly recognised. See The Brussels Convention, 1926 (*supra*, p. 286).

Proof of Character.—The public character of a vessel is primarily evidenced by her flag and pendant; or, in cases of doubt, and as a matter of courtesy, by the word of the commander. But the ultimate proof is to be found in the commission issued by the Government of the State to which she belongs (*k*); and *a fortiori* in the direct declaration or attestation of that Government itself (*l*). If, however, the question should not be one of privilege or exemption from the local jurisdiction, but one of international responsibility for the acts of such a vessel, then it seems that a denial by a State of the public character of a vessel whose conduct is in question will not always be conclusive, and that responsibility may be inferred from facts showing continued control for State purposes (*m*). At the same time, in cases where the question of the public character of a foreign vessel is raised before a municipal Court it is usual to accept a certificate from the political or executive department as conclusive, in the same way as on the question of the status of a foreign Sovereign (*n*) or diplomatic officer (*o*).

The Legal Position of a Public Vessel whilst in Foreign Ports or Territorial Waters.—A public vessel whilst merely passing through the territorial waters of a foreign State in time of peace is altogether exempt from territorial jurisdiction. When stationary or hovering in such waters her position will be the same as when in a foreign port. Even when in a foreign port she is, for the most part, exempt from local control and from the local jurisdiction, this being, as was pointed out by Marshall, C.J., in the case of *The Exchange*, a condition implicitly annexed to her reception or admission. Nevertheless, she is subject to certain obligations binding in comity; any neglect on her part may afford ground for remonstrance, or for the expulsion

(*k*) *The Santissima Trinidad*, 7 Wheat. 283.

(*l*) *The Parlement Belge*.

(*m*) For illustrations of this, see Hall, 214.

(*n*) See *Mighell v. Johore*, *supra*, p. 104.

(*o*) *Engelke v. Musmann*, [1928] A. C. 433.

of the vessel, or for a demand of satisfaction urged diplomatically, as occasion may require. In time of war, moreover, the public vessels of a belligerent are subject to certain exceptional limitations and restrictions, which are referred to below. The more particular applications of the general principle of exemption are as follows: A public vessel is not liable for local dues, such as harbour or light dues, or to inspection by customs officers (p). The vessel herself is not subject to the local law, or to legal process issuing out of the local Courts—at any rate beyond the point at which her claim to the public character is duly attested. Hence she cannot be seized for debt or damage, nor can salvage be enforced against her (q), nor do maritime liens attach so as to become enforceable if and when the ship is later transferred to private ownership, *The Tervaete*, [1922] P. 259. and a similar exemption attaches to her boats and tenders. The same privilege extends to her officers and the members of her crew whilst they remain on board. She may not strictly land armed forces without the consent of the territorial Power (r). But the members of her crew, if unarmed, are commonly allowed to visit the shore freely for all ordinary purposes, or to act as pickets in control of their own ship's company, or even to encamp on shore there during the docking of the ship. If, however, the members of her crew offend on shore, and are there arrested by the local authorities, they are strictly liable to detention and punishment (s). If they offend on shore, but escape to the ship, then they cannot be forcibly seized, although their surrender or punishment may be asked for; and if, in the case of a grave offence, this were refused, the territorial Power might exclude the vessel from her ports, and should apply for the extradition of the offender. At the same time, a public vessel is expected to show all due respect to the laws and government of the State in whose waters she is. She must not take advantage of her position to make local surveys of the coast or fortifications; sanitary and harbour regulations ought to be observed as a matter of comity; and, although not strictly subject to the local revenue laws, the vessel must not be made a medium for smuggling, or a centre of political intrigue. Any failure to comply with these

(p) Although Great Britain apparently still claims to exact an account of goods on board and to search if necessary; see *Customs Consolidation Act*, 1876, s. 52.

(q) *The Constitution* (1879), 4 P. D. 39.

(r) Some States enforce the observance of this rule more rigidly than others.

(s) This is not universally accepted. A number of writers hold that if they are ashore for the public business of the ship and not merely on shore leave, they are under the exclusive jurisdiction of their home State: *Oppenheim*, i. 668. Convenience would seem to sanction the arrest of sailors committing breaches of the peace on shore leave, for whatever reason they may be on shore, but that, as their detention or imprisonment might well affect the movements of the ship, they ought to be handed over to their own Commanding Officer for punishment. It would appear, however, that there is not general agreement on the point, and in default of general agreement, the local jurisdiction has the better claim to prevail.

obligations will, according to its degree of gravity, afford ground either for complaint, or for expulsion and exclusion, or for a demand of satisfaction from the State to which she belongs (t). If the vessel should cause damage, as by collision, the local Court may sit as a Court of Inquiry, and any claim so established may be urged diplomatically (u). In such cases, moreover, the local Court is sometimes requested by the Government to which the vessel belongs to arbitrate in the matter, and the award voluntarily complied with. Finally, in cases of exceptional gravity, involving some act of hostility or some act in subversion of the local authority, recourse might be had to force or reprisals (a).

"Asylum" on Public Vessels.—Although a public vessel is admittedly exempt from the territorial jurisdiction, it does not appear to be true, in principle, that persons taking refuge on board a public vessel are entitled to the same treatment as if they had taken refuge in the territory of the State to which the vessel belongs. Foreign territory, indeed, does carry a right of asylum, which can only be broken in certain cases and subject to the observance of certain recognised conditions. But a public vessel can scarcely be said to rank as foreign territory for this purpose; for the reason that she enjoys only that immunity from the local law and jurisdiction which is necessary to her due employment as an organ of the State and for national purposes; and this cannot well be said to include the protection of fugitives from the local law, or the enforcement with respect to them of her own law within the territory of another State. It is true that refugees, whether political offenders, or ordinary criminals, or fugitive slaves, cannot be forcibly seized; nor can the process of the local Courts be used in aid of their recovery. But if, as is submitted, there be no right to receive such persons, then their surrender may be required, irrespective of the existence of any extradition treaty, and without the observance of those conditions which usually attend the surrender of offenders who have taken refuge in foreign territory. And a refusal to surrender, in such a case, will, strictly, not only involve the State to which she belongs in the commission of an international delinquency, but will also expose the vessel herself to expulsion. At the same time the alleged right of asylum has the support of a considerable body of usage; although it would seem that this is not sufficiently uniform to form the basis of any international rule. So, with respect to political offenders, it is sometimes said that their reception on board a public vessel is justified by custom, so long as they are kept innoxious whilst on board (b). And, in the case of civil

(t) Westlake, i. 257.

(u) In at least one case the British Admiralty has paid compensation for damage done by a local Court to have been caused by British ships of war in a foreign port; see Hall, 248.

(a) See Hall, 246; and on the subject generally, Hall, 237; Taylor, 302; and Westlake, i. 254.

(b) Hall, 243; Westlake, i. 258.

war or popular insurrection, where the local sovereignty is temporarily in abeyance, such a practice would, no doubt, have the sanction both of custom and humanity. Hence, under the instructions issued by the British Admiralty to officers in command of public vessels, it is stated that during political disturbances or popular tumults refuge may be afforded to persons flying from personal danger; and the same practice would probably be followed by other States. But the right claimed for public vessels appears to go beyond this. Thus, in 1849, Lord Palmerston, in an official communication to the Admiralty, expressed the opinion that "although the commander of a ship of war ought not to invite political refugees, yet he ought not to turn away or give up any who may reach his ship. . . . Such officer must, of course, take care that such refugees shall not carry on from on board his ship any political correspondence with their partisans on shore, and he ought to avail himself of the earliest opportunity to send them to some place of safety elsewhere" (c). But if this opinion were now acted upon openly by a foreign public vessel, whilst in the territorial waters of a powerful State, it is probable that such conduct would speedily lead to her expulsion. In fact, however, the right of giving shelter to political offenders on board public vessels would appear to be confined to the cases previously indicated, or to countries which are either inferior in civilisation or defective in their methods of government (d). With respect to persons charged with offences of a non-political character, it would seem, both on principle and in view of current usage, that such persons ought to be surrendered, except, perhaps, where there is reasonable ground for believing that the charge is merely colourable (e). With respect to fugitive slaves, the matter has, since the abandonment of slavery by all civilised States, ceased to possess any great importance. The British practice on this subject was, and is still, regulated by the Fugitive Slave Circular of 1876; the general purport of which is that whilst the reception of slaves in the territorial waters of a State in which slavery still exists is a question of discretion on the part of the commander, in the exercise of which he is to be guided at once by considerations of humanity, comity, and regard for treaties, yet when once received, whether on the high seas or in territorial waters, no demand for surrender based solely on the ground of slavery is to be entertained. These instructions appear to be a compromise between law and humanity (f).

The Position of Military Forces when in the Territory of a Foreign State.—Akin to the position of public vessels in the waters of a foreign State is the position of the military forces of one State whilst in the

(c) Report of Royal Commission on Fugitive Slaves, p. 155.

(d) This question would really seem to be governed by considerations similar to those applicable to the alleged right of asylum in legations.

(e) And then only within the limits previously indicated with respect to political refugees.

(f) Phillimore, i. 437; Stephen, Hist. of Crim. Law, ii. 55 *et seq.*; and *Forbes v. Cochrane*, 2 B. & C. 448.

territory of another State with which it is in amity. This may occur either on a grant of passage to the troops of a friendly State (*g*); or in the course of military co-operation as between allies in time of war; or in the case where a conqueror continues in occupation of what was previously hostile territory, as security for the observance of conditions of peace or the payment of an indemnity. In any such case, unless otherwise agreed, jurisdiction is understood to be reserved to the State to which such military forces belong; although in the case of offences committed outside the line of march or away from the main body the punishment of the offender may, and perhaps should, be left to the local authorities (*h*). During the Second World War the position of allied forces on British soil was made the subject of express statutory enactment conferring jurisdiction on the States to which the forces belonged. Thus the Allied Forces Act, 1940 (3 & 4 Geo. 6, c. 51), made arrangements for the handing over of deserters, giving similar powers to those already existing in the case of dominion forces under the Visiting Forces (British Commonwealth) Act, 1933 (23 & 24 Geo. 5, c. 6). By the Allied Powers (Military Courts) Act, 1941 (4 & 5 Geo. 6, c. 21) maritime Courts of allied States with jurisdiction over merchant seamen in England were authorised. In these cases the jurisdiction allowed was not exclusive, but the Crown allowed allied Governments to legislate in the United Kingdom for their own subjects. See, for example, *Re Amand* (No. 2), 1942, 1 A. E. R. 236. By the United States of America (Visiting Forces) Act, 1942 (5 & 6 Geo. 6, c. 31), exclusive criminal jurisdiction over crimes committed by American troops in the United Kingdom was allowed to the U. S. A. military authorities (*i*). But where the forces of one belligerent are received into neutral territory in time of war, the neutral Power is required to disarm and intern them until the conclusion of peace, and may exercise all consequent jurisdiction over them (*k*).

RIGHTS AND DUTIES OF PUBLIC ARMED VESSELS ON THE HIGH SEAS

THE "MARIANNA FLORA"

(1826), 11 Wheaton 1; Scott 1009.

ON November 5, 1821, the United States armed schooner "Alligator", whilst on a cruise against pirates and slave-traders, encountered the Portuguese ship "Marianna Flora", then on a

(*g*) For an example of this, see p. 117, *supra*.

(*h*) Hall, 250.

(*i*) Wade and Philips, *Constitutional Law*, 3rd ed., 1946, p. 41.

(*k*) Hague Convention V, Art. 11, 1907.

voyage from Bahia to Lisbon. The fact of the "Marianna Flora" having shortened sail, and having a vane or flag on her mast somewhat below the head, together with her other manœuvres, induced Lieut. Stockton, the commander of the "Alligator", to suppose that she was in distress or wished for information. He accordingly approached her, whereupon the "Marianna Flora" fired on the "Alligator". The firing was repeated, and mutual hostilities took place, which resulted in the surrender of the Portuguese vessel. The Portuguese officers stated that they took the "Alligator" to be a piratical cruiser. Ultimately the "Marianna Flora" was sent into Boston and charged with piratical aggression. Upon the hearing, the ship was restored by the District Court, and damages were awarded for the act of sending her in. On appeal to the Circuit Court the decree for damages was reversed, the ship being restored by consent. An appeal on the question of damages was then taken to the Supreme Court, which affirmed the decree of the Circuit Court.

Judgment.] Story, J., in delivering the judgment of the Court, held that the case was not one of piratical aggression on the part of the Portuguese ship. If it had been, it would have justified her capture, notwithstanding that she was a foreign vessel. It was true that a hostile attack, even though falling short of piracy, made by one vessel on another might assume the character of private unauthorised war, in which case it might be punished by all those penalties which the law of nations could properly administer. But even this ingredient was wanting in the present case, for the reason that the aggression was due to mistake, although a very imprudent mistake, on the part of the master. This being so, the original libellants had now become defendants to a claim for damages on the part of the "Marianna Flora"; this claim being based on the ground that the conduct of Lieut. Stockton in approaching and seizing the vessel, and, in any case, in sending her in for adjudication, was unjustifiable. This rendered it necessary to ascertain what were the rights and duties of armed vessels navigating the ocean in time of peace. They had no right of visit and search, for that was a war right; and although under the United States laws both national ships and foreign ships offending within the jurisdiction might be pursued and seized on the ocean, yet this was not a

right of visit and search, but an act done only on condition of proof of its being justifiable, and under pain of indemnity if it were not. The ocean was the common highway of all, appropriated to the use of all; and every ship sailed there with the unquestionable right of pursuing her own lawful business without interruption. But at the same time she was bound to pursue it without violating the rights of others. With respect to ships of war sailing, as in the present case, under the authority of their Government, to arrest pirates and other public offenders, there was no reason why they should not approach any vessels at sea for the purpose of ascertaining their true character. Such a right was indispensable for the proper exercise of their authority. On the other hand, no ship in time of peace was bound to heave to and await the approach of any other ship; she was entitled to pursue her voyage in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack; she might consider her own safety, but she must take care not to violate the rights of others. She might use any precautions dictated by the prudence of her officers, but she was not at liberty to inflict injuries upon innocent parties simply because of conjectural dangers. After reviewing the facts of the case, the learned Judge came to the conclusion that the conduct of the commander of the "Alligator" in approaching and ultimately taking possession of the "Marianna Flora" was entirely justifiable. With regard to the question of damages, it was laid down that if damages were given it would be going a great way towards declaring that an exercise of honest discretion ought to draw after it the penalty of damages. Moreover, no decision had been cited in which the capture itself having been justifiable, the subsequent detention for adjudication had ever been punished by the award of damages.

It is especially the duty of public armed vessels to keep the police of the seas, and to put down pirates. For this purpose every such vessel has a right of approach, and, in cases of suspicion, a right to compel the suspected vessel to show her flag, together with a right of further investigation. But to warrant this, the case must be one of reasonable suspicion; and any abuse of this right will be a good ground on which to found a claim for reparation and damages. At the same

timo, a public vessel cannot be rendered liable for the consequences of the exercise of an honest discretion.

Public Armed Vessels on the High Seas.—Both in time of peace and of war it is the duty of public armed vessels, whilst on the high seas, to keep the police of the seas, to put down pirates, and to observe the rules of comity. Every such vessel has a right of approach for the purpose of ascertaining the character of any other vessel. In time of war, moreover, the public vessels of each belligerent are invested with a right of visit and search over neutral private vessels; and with a consequent right of arrest and detention in cases where there is reasonable ground for suspecting that a vessel has been guilty of any act which a belligerent is entitled to restrain. Even in time of peace the public armed vessels of one State possess a right of detention or arrest, as regards vessels belonging, or purporting to belong, to other States: (1) in cases of suspected piracy; (2) in cases where there is reasonable ground for believing that the vessel is engaged in some enterprise against the sovereignty or safety of the State to which the public vessel belongs; (3) in cases where a foreign vessel has been pursued on to the high seas after committing an offence in territorial waters (hot pursuit); and (4) in cases where such a right is conceded by treaty between the Powers to which the vessels respectively belong (1).

Abuse of Flag.—A vessel using the flag of another State than that to which she belongs, without authority, may be seized and sent in for punishment by any public vessel of the State whose rights are thereby infringed. The use, moreover, even of a national flag to which a vessel is not entitled is usually prohibited by municipal law. So, under the British law the unauthorised use of the British flag by a foreign vessel, save for the purpose of avoiding capture by an enemy, or the use of the public flag by a private vessel, is forbidden, under severe penalties (m).

In *R. v. Benson*, 3 Hagg. 96, proceedings were taken against the master of a merchantman for hoisting the King's colours in or near the Douro, with the result that the defendant was ordered to pay the statutory penalty; the Court pointing out that going into the Douro under colours usually hoisted by the King's ships, at the time in question, might have cast doubt on the neutrality and have affected the honour of Great Britain.

(1) Cf. British-American Liquor Agreement of January 23, 1924.

(m) See the Merchant Shipping Act, 1894, ss. 69, 73; and as to the penalty for concealment of the British or assumption of the foreign character, s. 70.

Maritime Ceremonials.—In addition to her right of approach, a public armed vessel is, both by the rules of comity and by maritime usage entitled to the salute of private vessels on the high seas. The salute may take the form of firing a cannon (*salut du canon*), or of striking the flag (*salut du pavillon*), or of lowering the sails (*salut des voiles*) (*n*). It is also the custom for ships of war to salute other ships of war under the command of an officer of superior rank, for a single ship of whatever rank to salute a fleet or squadron, and for an auxiliary squadron to salute the principal fleet (*o*). So under the British Admiralty Regulations a British warship meeting on the sea a foreign warship, bearing the flag of a flag officer or the broad pendant of a commodore commanding a station or squadron and superior in rank to the commander of the British ship, is required to salute the latter with the same number of guns to which a British officer of corresponding rank would be entitled upon being assured of receiving a similar salute in return, gun for gun and in a foreign port similar complimentary salutes are also required to be given if the regulations of the place admit of this being done. A British merchantman is, in strictness under an obligation to salute a British warship, and a failure to observe this obligation may entail the punishment of the master by the Court of Admiralty. Thus in 1829 the Court of Admiralty issued a warrant of arrest against the schooner *Native* for contempt in passing H.M.S. *Semiramis* without striking or lowering her royal, this being the uppermost sail which she was then carrying (*p*). British vessels other than certain classes of fishing boats are also required to show their colours on signal from a British warship, or on entering or leaving a foreign port, or if over fifty tons burden, on entering or leaving a British port (*q*).

PRIVATE VESSELS ON THE HIGH SEAS

THE CASE OF THE "COSTA RICA PACKET"

[British and Foreign State Papers vol. 87 (1894-95) vol. 89 (1896-97), and Moore International Arbitrations v. 4948.]

THE "Costa Rica Packet" was a British ship registered at the port of Sydney, New South Wales. In January, 1888, whilst engaged on a whaling voyage, the vessel being then to the north of the island of Boeroe, a waterlogged derelict prauw was sighted, and its contents, consisting of thirteen cases of spirits

(*n*) See Ortolan, *ii* c. 15

(*o*) See Phillimore *ii* 54

(*p*) See Phillimore *ii* 57

(*q*) See the Merchant Shipping Act 1894, s. 74

and a tin of kerosene, were taken on board, the prauw being left adrift. According to the British case, the master, J. B. Carpenter, who was a naturalised British subject, found it necessary, owing to the drunkenness of the crew, to order the spirits to be thrown overboard; but it was alleged by the Netherlands Government that the master, on his subsequent arrival at Batjan, sold a part for his own benefit. In November, 1891, the "*Costa Rica Packet*", whilst on another voyage under the same master, put into the port of Ternate, in the Netherlands Indies. On going ashore, Carpenter was arrested and imprisoned on a charge of having maliciously appropriated in 1888 the contents of the prauw when at a distance of not more than three miles from Boeroe. Carpenter, who appears to have been treated with great indignity, was detained in prison from November 2 to 28, when he was released, owing to the representations made on his behalf by the Governor of the Straits Settlements. In view of what had occurred, Great Britain subsequently made a claim against the Government of the Netherlands; claiming compensation for the losses incurred by the owners, master and crew in consequence of the voyage having been broken up, and also compensation for the imprisonment of the master and its attendant indignities (r).

The claim was based on the grounds that the acts, to which the local proceedings referred, had really taken place on the high seas and outside the territorial waters of the Netherlands Indies, and were thus manifestly beyond the jurisdiction of the Netherlands authorities; and also that there was no reasonable ground for the arrest. The Netherlands Government, on the other hand, maintained that the presumptions upon which the Court acted were sufficient to authorise the preliminary investigations for the purpose of which accused was arrested; and that the fact that the presumptions subsequently proved to be unfounded, or even that they were not sufficient to warrant the arrest, afforded no ground for any claim to indemnity. It was also contended that the Court had jurisdiction, because the goods were stolen on board a Netherlands Indies vessel (s), and because they were sold within its territory; that there was evidence that the prauw

(r) The amount claimed on behalf of the owners was £16,091 18s. 10d; on behalf of the master, £7,500; and on behalf of the crew, £8,000.

(s) The prauw.

had been seized within three miles of the shore; and that even if the seizure took place outside three miles it might still be considered as having occurred within territorial waters, since the three-mile limit applied only where established by a law or by an international convention. Great Britain, in reply, maintained that a derelict boat could not under any circumstances be brought within the principle that a vessel sailing under a national flag carried with her upon the high seas the municipal law of the flag. Ultimately, by a convention of May 16, 1895, it was agreed to submit the matter in dispute to the determination of a sole arbitrator nominated by Russia; with the result that de Martens was appointed by the Czar to act on that behalf.

The Arbitration.] In the award, which was pronounced on February 13/25, 1897, the principle was laid down that merchant vessels, whilst on the high seas, must be regarded as detached portions of the territory of the State whose flag they bear; and are, in consequence, amenable only to their respective national authorities for acts done on the high seas. It was found as a fact that the prauw when seized was undoubtedly beyond territorial waters; that the appropriation of the cargo was therefore cognisable only by English tribunals; that even the identity of the prauw had not been proved; that the Netherlands Indies authorities, by dropping the prosecution, had irrefutably established the impropriety of the detention; that the evidence proved lack of reasonable cause for the arrest; and that the master had been improperly treated during his incarceration. The arbitrator fixed the indemnity payable by the Netherlands at £8,550, with interest at 5 per cent. from November 2, 1891; and, in accordance with the authority vested in him by the convention, charged the Netherlands with the payment of the costs of the arbitration. The sum awarded, amounting in all to £11,082 7s. 6d., was paid by the Netherlands on March 3, 1897.

‘The decision in this case serves to illustrate the application of the principle that a private vessel on the high seas is, save in certain exceptional cases, subject only to the jurisdiction and control of the State to which she belongs.’ The same State is also entitled to protect the vessel and those on board against any interference on the part of other States which is not warranted by the law of nations, whilst it is answerable for any acts in the nature of international delinquencies

committed by her (t). Incidentally, several other points are touched on in the decision. Thus, it was contended in the Netherlands case that a Government is not liable for the arrest of a foreign subject merely because it eventually turns out that he is innocent; and this is no doubt true, provided the proceedings are regular under the local law, and are based on reasonable grounds; but, as the arbitrator held, it will not warrant the arrest of a foreign subject in pursuance of a jurisdiction which is altogether irregular and unrecognised by the law of nations. "Sovereignty", it was said, "cannot be exercised in derogation of that legal security which ought to be afforded in the territory of every civilised State". The contention that the derelict prauw, having once been Dutch property, still remained subject to the law of that flag, was probably founded on an opinion very commonly entertained, that derelict vessels and cargoes cannot be appropriated even on the high seas, and are still entitled to the protection of the flag (u). But it was held by the arbitrator, not only that the identity of the prauw had not been proved; but also that even if there had been a wrongful appropriation, this, having taken place on the high seas, was cognisable only by the English Courts, as the Courts of the State to which the vessel making the appropriation belonged (a). Finally, it will be noticed that the Netherlands Government denied, generally, that the territorial waters were necessarily confined within the limits of three miles from the shore. This contention was met by a finding in fact that the appropriation had actually been made outside Netherlands waters; and also by a ruling in law that the right of sovereignty over territorial waters was determined by the range of cannon-shot.

REG. v. LESLEY

(1860), Bell, C. C. 220; 29 L. J. M. C. 97.

THE defendant, who was master of the British ship "Louisa Braginton", had entered into a compact with the Chilian Government to carry from Valparaiso to Liverpool some political prisoners who had been banished from Chile. These prisoners were brought on board the ship at Valparaiso in official custody; and were delivered into the charge of the defendant and carried

(t) Although as regards other wrongs the obligation of the State is limited to the affording of all reasonable means of redress through its Courts.

(u) Oppenheim, i. 484; although it would seem in fact that if there is once an intention to abandon, the derelict becomes *res nullius*. By the Brussels Convention of 1910, the right to salvage is recognised. See the Maritime Conventions Act, 1 & 2 Geo. 5, c. 57.

(a) The arbitrator's view on this point seems in conflict with that of the majority of the Permanent Court of International Justice in the *Lotus Case*, *infra*, p. 250.

by him to England against their consent. On arriving at Liverpool the prisoners preferred an indictment for assault and false imprisonment against the defendant. At the trial evidence was given of the terms of the contract made between the Chilian authorities and the defendant under which the prisoners had been carried, of their protest, and the constraint put on them. At the trial a verdict of guilty was found by direction of the Judge, the question of law being reserved for the opinion of the Court of King's Bench. On a case stated, it was held by that Court that the defendant was liable in respect of what had been done outside Chilian waters.

Judgment.] In delivering judgment, Erle, C.J., after stating the facts, asked, first, whether a conviction could be sustained for what had been done in Chilian waters. This question was answered in the negative. It was to be assumed that in Chile the act of the Government towards its subjects was lawful; and although an English ship in some respects remained subject to English law in territorial waters of a foreign State, yet in other respects she was subject to the laws of that State, more especially as to acts done to the subjects thereof. It followed, therefore, that within Chilian waters the defendant could justify what he did there as agent for the Government and under its authority. Nor could such acts done by the authority of the State in whose territory they occurred be made the subject of proceedings in England: *Dobree v. Napier*, 2 Bing. N. C. 781. In the second place, it was asked whether the conviction could be sustained by reason of what had been done outside Chilian waters. This question was answered in the affirmative. It was clear that an English ship on the high seas, out of any foreign territory, was subject to the laws of England; and persons, whether foreign or English, on board such ship were as much amenable to English law as they would be on English soil. In *R. v. Sattler*, Dears. & Bell, C. C. 525, this principle had been acted on in such a way as to make the prisoner, a foreigner, responsible for murder on board an English ship at sea. The same principle was also laid down by foreign writers on international law, among whom it was enough to cite Ortolan, "*Sur la Diplomatie de la Mer*", liv, ii, c. 13. And a similar liability also existed under the Merchant Shipping Act of 1854. Such being the law, the detention of the prosecutors by the defendant ceased to be

justifiable after he had passed the line of Chilian jurisdiction, and after that became a wrong which amounted in law to a false imprisonment. For these reasons the conviction was affirmed. Incidentally, the learned Judge observed that transportation to England might be lawful by the law of Chile, and in that case a Chilian ship might lawfully transport Chilian subjects; but that for an English ship the laws of Chile out of that State were powerless, and the lawfulness of the acts could be tried only by English law.

Private vessels on the high seas are regarded in most respects as if they were a part of the country to which they belong. Hence, both in English law and in other systems, the law of the country to which the vessel belongs, and under the flag of which she sails is deemed to apply both to the vessel herself and to those on board; and this whether the latter are subjects of the State of the flag or not. With respect to crimes committed on board British vessels, the nature and limits of the original jurisdiction of the Admiralty, and its regulation by statute and gradual transfer to the ordinary Courts, have already been described. In addition to other statutes (b), the Merchant Shipping Act, 1894, now confers on British Courts a jurisdiction over offences committed not only on British ships on the high seas, whether by British subjects or others, but also over offences committed in any place, either ashore or afloat, outside the British dominions by any master, seaman, or apprentice, who at the time or within three months previously was employed in any British ship (c). But British Courts will not take cognisance of an offence committed outside British territory, by a foreigner on board a foreign vessel, although by 9 Geo. 4, c. 31, if the offence be committed by a British subject and the person injured dies in England, the British Courts have jurisdiction, as if the offence had been committed in the place where he dies (d); nor will they take cognisance of an offence committed by a foreigner on a ship that had been unlawfully seized by the British and placed in charge of British officers (e). And in certain States of the United States, by statute, an offence by whomsoever committed on the high seas whereby death ensues in any county may be prosecuted in such county (f). And the law of the flag is equally applicable to civil incidents and transactions that may occur on board; such as births,

(b) See 12 & 13 Vict. c. 96; and 24 & 25 Vict. c. 100, ss. 9, 57.

(c) See ss. 686 and 687. As to the difficulties incident to s. 686, see Piggott, *Nationality*, ii. 142, 145.

(d) *R. v. Lewis*, 7 Cox C. C. 277.

(e) *R. v. Serva*, 1 Den. C. C. 104.

(f) *Commonwealth v. Macloose*, 101 Mass. 1; *Tyler v. The People*, 8 Mich. 826. See also *Re Award of Wellington Cooks and Stewards Union*, 26 N. Z. L. R. 394.

deaths, marriages, and civil wrongs, as well as wills, conveyances, and contracts (g). Where, as in the case of the British Empire, the State of the flag comprises several countries, governed by different laws, then it would seem that the law of the country where the vessel is registered should apply, except in so far as the matter may be controlled by imperial or federal law (h). And very similar principles appear to obtain under the law of the United States.

In the case of the *Atalanta*, an American merchant vessel, whilst proceeding from Marseilles to New York, had been compelled, owing to acts of insubordination and violence on the part of the crew, to return to Marseilles. There a number of the crew were arrested, but six were returned to the vessel to be taken to the United States for trial. The latter were subsequently rearrested by the local authorities and detained in prison, together with seven others, notwithstanding the protests of the United States consul, who desired to remit them to the United States for trial. On the matter being referred to the United States Attorney-General for his opinion, he expressed the view that the fact of the crew having committed crimes on board the vessel outside the local jurisdiction did not give the local authorities any right to intervene; the doctrine of the public law on this point was well stated by Riquelme, to the effect that crimes committed on the high seas were to be regarded as having been committed in the territory of the State to which the ship belonged; and if the ship arrived in port, the jurisdictional right of the territory to which the ship belonged did not on that account cease (i).

The same rule would also seem to apply to matters of civil jurisdiction (k).

Private Vessels belonging to a State.—These are vessels which, although owned by private persons, are yet, by virtue of their title to the national character and their lawful use of the maritime flag of some State, deemed to belong to that State. Such vessels, even though outside the national territory, are entitled to the protection of their State, and are also subject to its authority and jurisdiction. Every private vessel is expected to fly some maritime flag. Hence, if the owner is a citizen or subject of a State which does not possess a maritime flag it will be incumbent on him to get permission to use the flag of some other State. Nor may any vessel, except in time of war, and for the purpose of evading capture, fly the flag of a State to which she is not entitled. This flag in the case of merchant vessels is of course the mercantile flag; but private yachts are often allowed to

(g) Save in so far as, in cases of contract, it may be excluded by a contrary intention. See *Lloyd v. Gubert*, L. R. 1 Q. B. 115; and *Bree v. Marescaux*, L. R. 7 Q. B. D. 434, where an action for slander uttered on board a British merchant ship at sea was held to be maintainable.

(h) See Dicey, *Conflict of Laws*, 5th ed., 687 n; *Crapo v. Kelly*, 16 Wall. 610; and J. S. C. L. No. 20, p. 202.

(i) Opn. of U.S. A.-G. viii. 73.

(k) See *Wilson v. McNamee*, 120 U. S. 572; *Crapo v. Kelly*, 16 Wall. 610; and cases referred to in Scott and Jaeger, pp. 355 et seq.

carry the special flag of the squadron to which they belong, and are in other respects accorded exceptional treatment. Each State determines for itself the conditions under which it will recognise vessels as entitled to its national character and to carry its mercantile flag. Some States extend this right, subject to certain conditions, to vessels owned by foreigners; others require a vessel to be at least partly owned by nationals; others require the vessel to be exclusively owned by nationals; whilst others, again, require that the vessel shall have been constructed within the territory and that she shall be manned in whole or part by citizens or subjects (*l*). The municipal laws of nearly every State also provide for the keeping of an official register, in which the names of all national vessels, and other particulars necessary for their identification, are enrolled.

British Vessels.—By British law no ship is entitled to registration as a British vessel unless she belongs either to natural-born subjects, or to persons naturalised in British dominions or made denizens by proper authority, or to corporate bodies established under the laws of, and having their principal place of business in, the United Kingdom or some British possession. Every British ship is required to be registered; and full provision is also made with respect to the registration of title to, and the transfer of interests in, British vessels. As has already been pointed out, the unauthorised use of the British flag by a foreign vessel, and unauthorised use of the foreign flag by a British vessel, save in certain eventualities, are prohibited under pain of forfeiture (*m*).

Proof of National Character.—In time of peace the proof of the national character is found primarily in the flag. This, however, is not conclusive; and in cases of doubt regard may be had to the official certificate of registration which a private vessel is required to carry, and which usually specifies the owner, the name of the ship, and other particulars necessary for verifying her nationality and identity. This should, if authentic, be treated as conclusive (*n*). But if its authenticity is doubtful, then regard may be had to other ship's papers (*o*). By the municipal regulations of most States, moreover, a private vessel is required to have its name and place of registry inscribed on the hull of the ship. In time of war the liability of a vessel depends on her possessing an enemy character, a question which is governed by special considerations which will be considered hereafter; and in such cases neither the flag nor proof of registration will avail, if it can be shown otherwise that the vessel is really affected with a hostile character (*p*).

(*l*) See Oppenheim, i. 474.

(*m*) Merchant Shipping Act, 1894, Part I, and especially ss. 68 *et seq*.

(*n*) But see *The Chartered Mercantile Bank of India v. The Netherlands Steam Navigation Co.*, 10 Q. B. D. at p. 535.

(*o*) Hall, 215.

(*p*) Vol. ii., "Enemy Character in Time of War"; *The Vigilantia*, 1 C. Rob. 1; and *The Benito Estenger*, 176 U. S. 568.

The Legal Position of Private Vessels on the High Seas.—A private vessel whilst on the high seas is subject only to the sovereignty of the State to which she belongs, save in cases of piracy, and in certain exceptional cases, the nature of which, whether in time of war or peace, has already been indicated. Outside these cases she is exempt from interference, and subject only to the jurisdiction of her own State. This comprises: (1) The exercise of an administrative jurisdiction in respect of all matters occurring on board, whether affecting subjects or foreigners. (2) With respect to crimes, all authorities, as we have seen, combine in declaring such offences to be subject to the jurisdiction of the State to which the vessel belongs. Nor, if she subsequently enters a foreign port, can the local Power forcibly intervene, even though its own subjects may be involved; although it may exercise jurisdiction by consent, or subordinately to the jurisdiction of the State to which the vessel belongs, if that State has not already acted, and if such proceedings are warranted by its own municipal law (*q*). (3) In civil cases, also, the State to which the vessel belongs has complete jurisdiction over its subjects on board, and the same jurisdiction over foreigners as it would have if they were within its territory, subject to any exemption that may exist by municipal law. (4) The same State is also entitled to exercise a protective jurisdiction over its national vessels on the high seas, except in cases where such a vessel has been guilty of some act of hostility, or some act which a belligerent is entitled to restrain, or, possibly, unless she has escaped to the high seas after violating the laws of another State within its waters. On the other hand, a State is responsible for the acts of its national vessels on the high seas so far as relates to wrongs constituting an international delinquency; whilst, as regards other wrongs, it is bound to afford proper redress through the medium of its Courts. But this does not apply to acts which are mere violations of belligerent rights, the vindication of which is left to the belligerent; or to acts of piracy, which are subject to the jurisdiction of any State (*r*). An exception to this exclusive jurisdiction of the State of the flag, however, is found in the fact that, by common maritime usage, a vessel coming into collision with another vessel on the high seas and subsequently putting into a foreign port is liable to be proceeded against in the local Courts, even though both ships are foreign and the matter is one in which only foreigners are concerned; and such Courts may, if they deem it expedient, exercise jurisdiction in the matter, for the reason that such cases are governed by the general maritime law. A similar exceptional jurisdiction may also be exercised in cases of salvage (*s*). Now, by the Brussels Conventions,

(*q*) As to *Anderson's Case*, in which a question of this nature arose between Great Britain and the United States, see Hall, 308 *n*; and Wharton, Digest, i. 123.

(*r*) On the subject generally, see Hall, 306.

(*s*) *The Johann Friederich*, 1 W. Rob. 35; *The Leon*, L. R. 6 P. D. 148; *The Two Friends*, 1 C. Rob. 271; *The Belgenland*, 114 U. S. 355; Scott, p. 358 *n*.

1910, uniform rules relating to collisions and salvage have been adopted. Mail-boats when on the high seas are not entitled to exceptional treatment, save by special convention. By The Hague Convention XI of 1907, such vessels are, in time of war, to be searched only when absolutely necessary, and then with all possible consideration and expedition, whilst all postal correspondence is declared to be inviolable.

The Doctrine of the Territoriality of Vessels.—In the case of the *Costa Rica Packet* the arbitrator based his decision on the ground, amongst others, that a merchant vessel, whilst on the high seas, constitutes a detached portion of the territory of the State whose flag she bears. A similar position is taken up by the Permanent Court in the *Lotus Case* (t). The doctrine is however a fiction explaining the practice as to jurisdiction, and cannot be pressed to its full logical conclusions. Thus a United States Court has held that a Chinese born of Chinese parents resident in the United States on an American ship at sea cannot be treated as having been born in the United States for purposes of nationality laws (u).

PRIVATE VESSELS IN FOREIGN PORTS AND TERRITORIAL WATERS

WILDENHUS' CASE

(1887), 120 U. S. 1.

IN this case it appeared that Wildenhus, a Belgian subject, and one of the crew of the Belgian ship "Noordland", had, during an affray which took place on board that vessel whilst in dock in the port of Jersey City, in the State of New Jersey (U.S.A.), in October, 1886, stabbed and killed another member of the crew. It also appeared that by a convention entered into in 1880 between the United States and Belgium it was provided, in effect, that the Belgian consul should have cognisance of all differences occurring on board Belgian vessels when in the ports of the United States; and that the local authorities should not interfere "except when a disorder arose of such a nature as to disturb the tranquillity or public order on shore or in the port". Wildenhus having been arrested by the local authorities, the Belgian consul applied to the Circuit Court to discharge the prisoner on a writ of *habeas corpus*. On behalf of the application

(t) P. C. I. J. Series A, No. 9, at p. 26.

(u) *Re Lam Mow*, 1928 (A.D. 1927-1928, No. 192).

it was contended that both by virtue of the general rules of international law, and more especially by virtue of the treaty of 1880, Belgium alone had jurisdiction in the matter. The Circuit Court refused to discharge the prisoner; whereupon an appeal was taken to the Supreme Court. In the result, it was held by the Supreme Court that both by the general rules of international law and under the provisions of the treaty the United States Courts had jurisdiction to try the offence; and that the exception set up by the treaty did not apply to a case of felonious homicide committed on board a Belgian vessel within a port of the United States.

Judgment.] Waite, C.J., in delivering the judgment of the Court, observed that it was a part of the law of civilised nations that when a merchant vessel of one country entered the ports of another for the purpose of trade it became subject to the local law, unless it had been otherwise agreed by treaty. For, as had been pointed out by Marshall, C.J., in *The Exchange*, 7 Cranch 116, at p. 144, it would be a source of manifest inconvenience and danger if such merchantmen did not owe a temporary allegiance to the law and were not amenable to the local jurisdiction in return for the protection to which they were for the time being entitled. The English Judges, moreover, had uniformly recognised the right of the Courts of the country in which the port was situated to punish crimes, even when committed by one foreigner against another on a foreign merchant ship: *R. v. Cunningham*, Bell C. C. 72; *R. v. Anderson*, 11 Cox C. C. 198; *R. v. Keyn*, 2 Ex. D. 68. Experience, however, had shown that it was convenient for the local Government to abstain from interfering with the internal discipline of the ship and the relations of officers and crew amongst themselves. And so, in comity, it had come to be generally recognised amongst civilised nations that "all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and which did not involve the peace or dignity of the country or the tranquillity of the port, should be left to be dealt with by the authorities of the nation to which the vessel belonged", as its laws or the interests of its commerce might require. But if crimes were committed on board of such a character as to disturb the peace and tranquillity of the country, then neither by comity nor by usage

had the offender any exemption from the local jurisdiction if the local tribunals thought fit to exert it.

Such being the general public law on this subject, various treaties and conventions had been entered into for the purpose of defining more exactly the rights and duties of the parties with respect to this matter. Amongst others, such a treaty had been entered into between the United States and Belgium; and now constituted a part of the law of the land. If it could be shown to confer on the consul an exclusive jurisdiction over the offence alleged to have been committed, then there was no reason why he should not enforce his rights under the treaty by writ of *habeas corpus*. But the exclusion of the local jurisdiction was not to apply when a disorder arose on board of such a nature as to disturb the tranquillity or public order on shore or in the port. The question, therefore, was whether what had been done on board was of a nature to disturb the public peace or repose of those who looked to the State for their protection. If it was of such a character as to affect those on shore or in the port when it became known, then the fact that it was witnessed only by those on board was of no moment. If the crime was of such gravity as to arouse the public interest when it became known, and especially if it was one which any civilised nation felt bound to visit with severe punishment if committed within its jurisdiction, then it constituted a disorder the nature of which affected the community at large and warranted the interference of the local Government. The principle which governed the matter was this : Disorders which disturbed only the peace of the ship or those on board were to be dealt with by the Sovereign of the country to which the ship belonged; but those which disturbed the public peace might be suppressed, and, if need be, punished, by the proper authorities of the local jurisdiction. It might not always be easy to decide to which of these categories an offence belonged. Much would depend on the special circumstances of each case. But all would concede that felonious homicide was a subject for the local jurisdiction; and that if the local authorities proceeded to deal with the case in a regular way, then the consul of the country to which the ship belonged had no right to interfere.

The judgment in this case contains an admirable statement of the course and present position of international usage with respect to the exercise of jurisdiction over private vessels when in foreign ports. The municipal law of different States, on this subject, varies somewhat. For international purposes, however, it would seem that the primary rule, and that which best accords with the fundamental principle of territorial sovereignty, is that such vessels are at all points subject to the local law and local jurisdiction. But, as a matter of comity and convenience, it is usual for the territorial Power to refrain from interference in matters that affect merely the internal order and discipline of the ship; which are therefore left to the regulation of the law of the flag, save in cases where help is expressly sought. By conventions made between particular States, moreover, this exemption from the local jurisdiction is often carried further; and a limited jurisdiction is conferred on the consul of the State to which the vessel belongs, except in cases where the public order or the peace of the port are disturbed, or strangers are affected. The judgment in *Wildenhuis' Case* decides that such an exception must not be taken in a purely material sense, but must be deemed to include offences which, even though committed wholly on board and primarily affecting only members of the crew, are yet of so grave a character as to impose on the territorial Power a duty to take steps for their punishment.

Private Vessels in Foreign Ports and Territorial Waters.—Although there is some difference both of opinion and of practice as to the precise position occupied by private vessels whilst in foreign ports with respect to jurisdiction (a), yet on certain points both opinion and practice appear to concur. On the one hand, such vessels are undoubtedly subject to local dues; they are subject to all local revenue, harbour, and quarantine regulations; and they are amenable to the local law and the process of the local Courts in respect of all matters relating to the title to the vessel, liability for debt, damage, salvage, or the infringement of local regulations (b). Members of the crew are also liable for offences committed on shore, or even on board if the subjects or interests of the territorial Power are affected; and process against them may be served, and arrests effected, on board, to the same extent as on vessels belonging to the territorial Power. Nor is there any right of asylum either as regards political offenders or other fugitives from justice (c). On the other hand, it is, as we shall see, not usual for the local authorities to intervene in minor matters relating to the internal discipline and order of the ship; the regulation of these matters being left to the ship's officers, subject to the supervision of the consul, and in accordance with the law of the country to which the ship belongs. The law of the flag also continues to govern civil rights and obligations

(a) Hall, 253; *Charteris*, [British Year Book of International Law, 1920-21, 45.

(b) But as to mail ships, see p. 312, *infra*.

(c) As to the right of arrest on board foreign merchant vessels, Taylor, 314.

arising out of matters occurring on board (*d*), either as between persons on board or in relation to the ship, except in so far as, in cases of contract, some other law may be contemplated by the parties (*e*).

Practice with respect to Jurisdiction.—It is mainly with respect to the exercise of criminal and police jurisdiction that the practice of States differs. (1) Some States follow primarily the rule that both the vessel and those on board are subject to the law of the port. So Great Britain, with respect to foreign vessels in British ports, assumes the territorial law to be applicable; but does not ordinarily interfere in matters of internal discipline and administration unless help is asked (*f*). With respect to British ships in foreign ports, Great Britain recognises the primary claim of the territorial law; but asserts a concurrent right of jurisdiction over offences committed on board, whether by British subjects or other persons (*g*), and British consuls are empowered by statute to take the necessary steps for giving effect to this jurisdiction (*h*). The practice of the United States appears to be similar, except where otherwise provided by treaty or convention (*i*). Thus in 1933 in the case of *U. S. v. Flores* a United States citizen was convicted for a murder on board a United States ship committed at Matadi, a Belgian port on the Congo river 250 miles from the mouth of the river (*k*). (2) Other States, by their municipal law, and apart from convention, disclaim jurisdiction not only in matters of internal discipline, but also over crimes and lesser offences committed by the crew against each other; reserving, however, a right to intervene in cases where help is asked or the peace of the port is disturbed, or strangers are affected. Such States also claim a like jurisdiction over their own vessels whilst in foreign ports, in so far as this is compatible with the territorial law (*l*). (3) Finally, as between some States it

(*d*) For an interesting example, see British Nationality Act, 1914, s. 1 (*c*).

(*e*) Hall, *Foreign Jurisdiction*, 80; and as to contracts, *Lloyd v. Guibert*, L. R. 1 Q. B., at p. 128.

(*f*) *R. v. Keyn*, 2 Ex. D., at pp. 82, 83, 93, 202. But in any case where an appeal is made to the Courts the local law must be applied: see Piggott, *Nationality*, ii. 21. The present tendency, moreover, is to apply to foreign vessels all such local regulations as may be essential to safety; see the Merchant Shipping Act, 1906.

(*g*) And this applies equally where the vessel is lying in foreign territorial waters other than ports: see *R. v. Carr*, 10 Q. B. D. 76; *R. v. Anderson*, L. R. 1 C. C. R. 161; 24 & 25 Vict. c. 94, s. 7; c. 96, s. 115; c. 97, s. 72: the Merchant Shipping Act, 1894, ss. 686, 687; and 5 Edw. 7, c. 10, s. 1.

(*h*) See the Merchant Shipping Act, 1894, s. 689, although the exercise in foreign countries of some of the powers conferred, as well as the exercise of the jurisdiction conferred by ss. 480-486 on Naval Courts, would appear to be of questionable validity; Piggott, *Nationality*, ii. 30 and 31.

(*i*) See Wharton, *Dig.* i. 131; Taylor, 311 *et seq.*; and *Re Ross*, 140 U. S. 453.

(*k*) *Hudson, Cases*, 587; *Annual Digest*, 1931-2, No. 91, p. 175; Scott and Jaeger, p. 286.

(*l*) See Ortolan, *Diplomatie de la Mer*, i. 271, and Annexe J. p. 445; Hall, 255; Taylor, 312. Thus where an Italian fireman on board an Italian ship in a Spanish port made insulting remarks concerning Mussolini, and the Spanish

has been sought to obviate the inconvenience which might otherwise arise from a conflict of jurisdiction, by means of consular conventions. The general effect of these, as between the parties, is to bestow on the consul of the State to which the vessel belongs an exclusive control over all matters relating to the internal order of the vessel, together with a limited right of jurisdiction both in civil and criminal cases, and a right to invoke the assistance of the local authorities in its exercise, but to reserve the jurisdiction of the territorial Power in cases where the public order or the peace of the port or strangers are affected (*m*). But although such a waiver of the local jurisdiction is in itself reasonable and convenient, it cannot, so far, be regarded as obligatory apart from convention (*n*). Nor is it always easy to determine the precise scope of these exceptions to the territorial jurisdiction, even when established by convention. Hence, until the question of jurisdiction is settled by general international agreement, it would seem that, in all cases of doubt or conflict, the only safe and true rule is that the law of the flag must be deemed to operate in subordination of the law of the port (*o*).

Private Vessels passing through Foreign Territorial Waters.—

Private vessels whilst passing through foreign territorial waters are theoretically in the same legal position, but in practice the territorial Power does not exercise its jurisdictional rights except in cases where its revenue, fishery, or quarantine laws are infringed, or where the act of the vessel or those on board involves some injury to persons or property outside the vessel herself (*p*).

Mail Ships.—As between particular countries, moreover, certain exemptions from the local jurisdiction, varying in extent, are sometimes conceded to mail ships (*q*). So, in the United Kingdom the Mail Ships Act, 1891, enables certain privileges to be granted by convention to ships engaged in the postal service, and an 'exempted mail ship' (*r*) may be freed from liability to arrest or detention, whilst the arrest even of persons on board can only be effected subject to the observance of certain conditions (*s*). And a convention on these terms

Government took no action, as the place of the port was not involved, on return of the ship to Genoa, he was tried and convicted by the Italian Courts *Public Prosecutor v Tarasco* 1930 Annual Digest 1929-30 No 67

(*m*) In this way the jurisdiction of the consul, which is otherwise only voluntary, is greatly enlarged

(*n*) Hall, 256

(*o*) Piggott, *Nationality*, n 17, 21

(*p*) See Hall, 256

(*q*) For an example of the concession of the full privilege of public vessels to mail ships by the local municipal law, see Piggott, *Nationality*, n 15 n

(*r*) This being a ship subsidised for the execution of the postal service by a foreign State, which has given security to meet local claims

(*s*) The Act may also be applied to British colonies, see 54 & 55 Vict c 31, ss 4 and 5

had in fact been entered into between Great Britain and France in 1890 (t).

Vessels putting into a Foreign Port under Constraint.—It is sometimes asserted that private vessels putting into a foreign port in consequence of duress or under stress of weather are by that fact alone exempted from the local law and local jurisdiction.

Such a contention was put forward by the United States Government in the case of the *Creole*. The latter was an American vessel, carrying a cargo of slaves, and bound for New Orleans. In the course of the voyage the slaves rose in revolt, murdered a passenger, and wounded the captain and several of the crew, and then forced the latter to put into the British port of Nassau. The British authorities, whilst imprisoning those concerned in the murder, refused to interfere with the freedom of the others, on the ground that the moment they came into British territory they became free. On appeal by the owners to their Government, the Attorney-General of the United States gave an opinion to the effect that "if a vessel were driven by stress of weather, or forced by *vis major* to take refuge in the ports of another nation, she was not to be considered as subject to the municipal law of the latter, so far as related to any penalty, prohibition, tax, or incapacity that would otherwise be incurred by entering such port, provided she did nothing to violate the municipal law during her stay"; and this principle, it was contended, was not only a principle of the law of nations, but had also been recognised by English law (u). In the result the matter was submitted to arbitration, and an award given against the British Government (a).

In the case of the *Industria* the British law officers also expressed the view that a foreign vessel carrying slaves which had put into a British port in distress was exempt from seizure by the local authorities, even though she might have been seized by a British cruiser on the sea, under the treaty with Spain (b).

But despite these opinions, and notwithstanding that this principle is frequently cited with approval, it would seem that such an immunity is not well founded, or in any sense obligatory; and that whilst putting into port under constraint might be a good ground in comity for excusing such infringements of local regulations as were due to the exigencies of her position (c), it would certainly not carry any legal right to exemption from the local law or local jurisdiction. Nor would such an excuse, in any case, serve to exempt a vessel from the consequences of offences previously committed in violation of the law of nations (d).

(t) The Act has a retrospective operation; see Piggott, *Nationality*, ii. 16; Ferguson, i. 448.

(u) The reference being to certain provisions of the Navigation Acts previously in force: see Opns. of U. S. A.-G. iv. 98.

(a) Parl. Papers, 1849, vol. lxi; and for a criticism of the award, Scott, p. 345 n.

(b) Forsyth, *Const. Cases*, p. 399; see also *The Fortuna*, 5 C. Rob. 27; *The Jonge Jacobus Baumann*, 1 C. Rob. 243.

(c) Such as harbour or quarantine rules.

(d) *The Carlo Alberto* (Sirey, Recueil, 32, pt. i, 578).

PIRACY, AND ACTS ANALOGOUS THERETO

THE UNITED STATES v. SMITH

(1820), 5 Wheat. 153.

THE prisoner, Thomas Smith, had formed one of the crew of a private armed vessel commissioned by the Government of Buenos Ayres, a colony then at war with Spain. Smith and others of the crew, when in the port of Margaritta, mutinied and left the vessel. Thereafter, having seized by violence another private armed vessel lying in the same port, they proceeded to sea without any document or commission, and in course of their cruise plundered and robbed a Spanish vessel. For this Smith was subsequently indicted for piracy before the Circuit Court of Virginia. The proceedings were taken under an Act of Congress of March 3, 1819, which provided that if any person should commit on the high seas the crime of piracy, *as defined by the law of nations*, and should afterwards be brought into or found in the United States, he should, on conviction, be punished with death. A special verdict was returned by the jury, and the Circuit Court being divided in opinion as to whether the facts as found amounted to piracy by the law of nations, the question was reserved for the decision of the Supreme Court. In the result it was held that such facts amounted to piracy by the law of nations, and that such offence was therefore punishable under the Act of Congress.

Judgment.] In the judgment of the Court, which was delivered by Story, J. (Livingstone, J., dissenting), the first question considered was whether an Act of Congress which merely referred to the law of nations for a definition of piracy was a constitutional exercise of the powers of Congress to define and punish piracy. As to this it was held that Congress might equally well define an offence by using a term of known and definite meaning, as by an express examination of all the particulars included in that term. The next point considered was whether the crime of piracy was defined by the law of nations with reasonable certainty. As to this it was held that the law of nations must be ascertained by consulting the works of jurists writing professedly on public law; or from the general usage and practice of nations; or from judicial decisions

recognising and enforcing that law. There was scarcely a writer on the law of nations who did not allude to piracy as a crime of a settled and determinate nature; and whatever might be the diversity of definitions in other respects, all writers concurred in holding that robbery or forcible depredation upon the sea, *animo furandi*, amounted to piracy. The same doctrine was held by all the great writers on maritime law; as well as by those on the common law. Amongst others, Sir Leoline Jenkins observed that "a robbery, when committed on the sea, is what we call piracy". And the general practice of all nations in punishing all persons, whether natives or foreigners, who had committed this offence against any persons with whom they were in amity was a conclusive proof that the offence was supposed to depend, not upon the particular provisions of any municipal code, but upon the law of nations, both for its definition and punishment. With respect to a final objection as to the sufficiency of the special verdict, it was laid down that inasmuch as the jury had found that the prisoner was guilty of the plunder and robbery charged in the indictment, together with certain additional facts from which it was manifest that he and his associates were at the time freebooters on the sea, not under the acknowledged authority or deriving protection from the flag or commission of any Government, it was difficult to conceive what facts could more completely fit in with the definition of piracy.

In the case of *Serhassan Pirates*, 2 W. Rob. 354, it was held by the English Court of Admiralty that the commission of piratical acts was sufficient to clothe men with a piratical character, apart from the avowed following of a piratical occupation; and also that piracy might be committed either on the sea, or by descent from the sea, or by descent from the land.

In the case of *The Magellan Pirates*, 1 Spinks 81, it was also held that the fact that persons were rebels against their own Government did not preclude liability for what were virtually piratical acts, including robbery and murder on the sea, against other persons.

Piracy is also invariably an offence in municipal law. Thus, in English law, piracy at common law consisted in the commission of acts of robbery or depredation upon the high seas or in other places where the Admiralty had jurisdiction, which if committed on land would have amounted to felony there (*e*). But by statute other offences

have now been made piracy; such as the committing of acts of hostility by a natural-born subject or denizen against other British subjects, on the sea, under colour of a commission from any foreign Power (*f*); the act of a master in running away with a ship, in betrayal of his trust (*g*); or in adhering on the sea to the King's enemies on the part of a natural-born subject or denizen (*h*); or even trading with and conspiring with pirates (*i*); as well as certain acts of slave-trading (*k*). But in so far as piracy is extended by municipal law beyond the limits of piracy *jure gentium*, it will not be justiciable except in the State to which the offender belongs, or against which the offence was committed (*l*).

In *Re Tynan*, 5 B. & S. 645, it was held that an extradition treaty between Great Britain and the United States for the delivering up by one State to the other of persons charged (*inter alia*) with piracy committed within the jurisdiction of the latter, did not extend to piracy *jure gentium* committed on an American vessel on the high seas, for the reason that this was justiciable everywhere; but only to acts that were piracy by municipal law, which were only adjudicable in the territory of the State seeking extradition.

RE PIRACY JURE GENTIUM

103 L. J. P. C. 153; [1934] A. C. 586.

THIS was a Special Reference of a point of law to the Judicial Committee of the Privy Council under an Order in Council made under section 4 of the Judicial Committee Act, 1833, dated November 10, 1933. The question referred to the Judicial Committee was whether actual robbery is an essential element of the crime of piracy *jure gentium*, or whether a frustrated attempt to commit a piratical robbery is not equally piracy *jure gentium*.

The reference arose out of an incident in the Far East. In 1931 a number of armed Chinese in two Chinese junks were

(*f*) 11 Will. 3, c. 7, s. 8.

(*g*) *Ibid.* s. 9.

(*h*) *R. v. Vaughan*, 13 St. Tr. 525 (1696); 11 & 12 Will. 3, c. 7; 8 Geo. 1, c. 24; 2 Geo. 2, c. 28; 18 Geo. 2, c. 30; 7 Will. 4 & 1 Vict. c. 88.

(*i*) 8 Geo. 1, c. 24.

(*k*) 5 Geo. 4, c. 113, s. 9; for a complete list, see Stephen, *Digest of the Criminal Law*.

(*l*) *Le Louis*, 2 Dods. 210.

captured while attacking a Chinese cargo junk. They were placed in charge of H.M.S. "Somme", and brought as prisoners to Hong Kong where they were tried and convicted as pirates, subject to the question of law whether an accused person can be convicted of piracy though no actual robbery has been committed.

The Full Court of Hong Kong decided that actual robbery was an essential element in the offence. In view of the consequences of an acquittal in such circumstances, it was decided to obtain the opinion of the Judicial Committee by Special Reference.

The Judicial Committee held that actual robbery is not an essential element in the crime of piracy *jure gentium*. A frustrated attempt to commit a piratical robbery is equally piracy *jure gentium*.

The Hong Kong Courts in this case, following the general language of certain decided English cases, reached a surprising and most undesirable conclusion. The Privy Council in considering a number of these cases, such as *R. v. Dawson* (1696), 13 St. Tr. 451, *U.S. v. Smith* (1820), 5 Wheaton 153 (*supra*, p. 314), and *U.S. v. The Malek Adhel* (1844), 2 How. 210, pointed out that, in using the language relied on for the accused in the case of *Re Piracy Jure Gentium*, the minds of the Judges were not directed to the point at issue in the latter case, and that in the cases they were deciding there had been actual violence. In considering the question before them the Privy Council held that they could consult a wider range of authorities than in purely municipal law cases. The sources of international law included treaties, State papers, municipal Acts of Parliament and the decisions of municipal Courts, as well as the opinions of juriconsults or text-book writers. Having consulted these, and finding that by international law the criminal jurisdiction of municipal law extended to piracy committed on the high seas, they reached the entirely reasonable conclusion that success is not a necessary ingredient to the crime of piracy. The armed ship which cruises the seas without commission from any State, with the proved intent to attack and plunder the ships of peaceful traders, is still a pirate, though no actual attack has been made—though if no attempt had been made the proof of intent might be difficult. In the case before the Privy Council in 1934 there had been an actual pursuit of cargo junks—a clear attempt at robbery, and the decision arrived at was that most conducive to the successful repression of piratical activities.

Piracy Jure Gentium.—Piracy in the law of nations may be defined as the offence of depredating on the high seas without lawful authority (*m*). In its usual signification piracy includes both any organisation for the purpose of plunder, whether on the sea or by descent from the sea; and also robbery or murder on the high seas accompanied by mutiny. The term has, as we shall see, also been extended to other cases which do not appear to involve either of these conditions. But such acts, even though they may share the common attribute of piracy, in being done under conditions which make it impossible to hold any State responsible for their commission, are really distinguishable from piracy proper, both in the matter of jurisdiction and punishment. At the same time, if persons, even though animated by other motives, commit or attempt to commit robbery and murder on the sea, they will be guilty of piracy (*n*). Piracy being an offence *jure gentium* the pirate is deemed to lose his nationality and the pirate vessel her right to the protection of her national flag, if any; with the result of becoming liable to seizure and punishment at the hands of any State.

In *The Attorney-General of Hongkong v. Kwok-a-Sing*, L. R. 5 P. C., at p. 199, it was held that where a number of Chinese coolies, who were being carried on a French ship, killed the captain and several of the crew, and took the ship to China, they were guilty of piracy *jure gentium*.

It is especially the right and the duty of public vessels to suppress pirates; but it would seem that this right may also be exercised by a private vessel. Pirates may be captured on the sea or in territorial waters, or in territory unappropriated by any State. But although a pirate may be tried in any Court and is within the criminal jurisdiction of any State, he is still entitled to regular trial; and cannot, as was formerly the custom, be summarily executed. The stigma of piracy attaches to the vessel and warrants her confiscation; but not, it seems, to the cargo where this belongs to innocent persons (*o*). Nor will the taint of piracy attach to the vessel if she has, before condemnation, passed into the hands of a *bona fide* and innocent purchaser (*p*). Nevertheless, a pirate cannot strictly confer title, and, on recapture, vessels or property seized by pirates will revert to their former owners, if the real ownership can be ascertained, subject to the payment of salvage to the recaptor. The subject of piracy has in recent times become of comparatively minor importance, for the reason that piracy proper is now virtually confined to certain Eastern waters; but the rules for its ascertainment still require to be studied in relation to acts bordering on piracy, which are considered below.

(*m*) But see Hall, 313.

(*n*) *The Magellan Pirates*, 1 Spinks 81; *U. S. v. Smith*, 5 Wheaton 153.

(*o*) *Malek Adhel v. The United States*, 2 How. 210.

(*p*) *R. v. McCleverty*, L. R. 3 P. C. 673.

Acts sometimes classed with Piracy.—Besides piracy proper, there are also other acts which are sometimes classed with piracy. Thus, the acceptance of a commission by a vessel from two belligerents is sometimes stigmatised as piracy. But although such conduct would undoubtedly amount to piracy if such commissions were accepted from two hostile States, yet if the belligerents were allied and hostile action were taken only against a common foe, it would only be irregular, and not piratical. There has also been some disposition to regard as a pirate a subject of a neutral State who accepts a commission from one of two belligerents. But although this is often prohibited by treaty or municipal law, it can scarcely be regarded as piracy under the law of nations. At the same time, if prohibited by treaty it might conceivably be punished as a war crime, whilst if forbidden by municipal law the offender might be handed over to his own State for punishment (q). But in view of the virtual abolition of privateering, these cases now possess but little importance. Persons engaged even on the high seas in aiding rebels have on some occasions been treated as pirates; but although there is, as we have seen, a remedy available in such cases to the Power whose security is threatened, the claim to treat such acts as piracy would seem to be altogether unwarrantable (r). Finally, unrecognised insurgents carrying on war by sea have sometimes been pronounced pirates, a conclusion equally unwarrantable in so far as it is based on the character alone, although justifiable if based on conduct which is in fact piratical (s).

The term piracy is often also, though improperly, applied as a term of abuse to war crimes consisting of illegal violence at sea committed by belligerents in the course of hostilities.

INSURGENTS CARRYING ON WAR BY SEA

THE "HUASCAR"

[Parliamentary Papers, 1877, vols. lii and lxxxiii.]

IN 1877 a revolutionary outbreak took place in Peru, in the course of which the ironclad "Huascar" was seized at Callao by her crew and by some of her officers, in the interest of the insurgent leaders. She then cruised off the coast; and, amongst other things, stopped several British vessels, seized dispatches

(q) On the question generally, see Ortolan, i. 219, 430; and Hall, 315; Wharton Dig. iii. 327.

(r) *Supra*, p. 188.

(s) *Infra*, p. 320. See also *The Republic of Bolivia v. Indemnity M. M. Assurance Co.*, [1909] 1 K. B. 785.

for the Peruvian Government, abstracted two passengers who were officials of the Peruvian Government, and in one case also took a quantity of coal which was not paid for. It appeared also that a British subject was detained on board and compelled to act as engineer. Meanwhile the Peruvian Government had issued a proclamation to the effect that it would not be responsible for the acts of anyone on board the "Huascar". The British Admiral, De Horsey, under these circumstances, summoned the "Huascar" to surrender, and, failing this, an action was fought, in which the "Huascar" sustained considerable damage, but succeeded in escaping under cover of the night. On the following day she surrendered to the Peruvian national squadron. A claim for compensation was subsequently made by the Peruvian Government against Great Britain, in respect of the damage done to the "Huascar".

Opinion.] The matter having been submitted to the Law Officers of the Crown, the latter advised that, inasmuch as the vessel had been taken out of the hands of the proper authorities, and the Peruvian Government had disavowed liability for her acts, she was sailing under no flag, and no redress could be obtained for any acts which she might commit; and that in view of what had occurred the proceedings resorted to by Admiral De Horsey were justifiable. The Peruvian Government also submitted the matter to its Law Officers, and the latter having advised that the acts of the "Huascar" were piratical the matter was allowed to drop.

The opinion in this case, although justified by the facts, and although a good precedent in the like circumstances, must not be taken as deciding that the acts of unrecognised insurgents will under all circumstances be regarded as piratical. In the case of the *Huascar* the insurgents had apparently no organised Government even of a provisional kind; the national Government had officially disclaimed any responsibility for her acts; whilst those on board her had, in the forcible seizure of coal and in the abstraction of passengers and dispatches from British vessels, as well as in detaining by force a British subject who was seemingly under no obligation of service to the revolutionary leaders, exceeded even those rights of interference with neutral commerce which are accorded to a recognised belligerent.

The Position of Unrecognised Insurgents.—The position and rights of an insurgent community whose belligerency has been recognised have already been described. The case of unrecognised insurgents is one of greater difficulty. According to one view, the mere fact of purporting to carry on war by sea, without a commission from some recognised Government, will in itself constitute a technical act of piracy, which will justify interference on the part of States not immediately affected, and will also warrant the condemnation of any vessel so employed (t). But according to another view, which appears at once more correct in principle and more consistent with the usual practice, acts done by insurgents, even though unrecognised, which were done for political ends, are not liable to be regarded as piratical so long as they do not involve acts of spoliation or violence towards other persons than the adherents of the Government against which the insurrection is directed. Nor, in such a case, is there either a right or a duty of interference on the part of other States.

In 1877, in the case of the *Montezuma*, a Spanish vessel which had been seized by the Cuban insurgents and which the Brazilian Government was asked by Spain to treat as a pirate, it was held that ships belonging to insurgents who confined their operations to the State against which they were in revolt could not be treated as pirates by foreign Powers (u).

In 1905, in the case of the *Kniaz Potemkin*, where a Russian warship had been seized by her crew, in connection with a revolutionary movement then proceeding in Russia, and subsequently put into Constanza, the Roumanian authorities, whilst refusing supplies, yet did not treat the insurgents as pirates. It was, however, intimated that if the crew surrendered the ship and came on shore they would be treated as deserters and allowed their liberty, subject to being disarmed; and, this course having been adopted, the ship was taken possession of by the Roumanian Government and subsequently handed over to Russia.

Moreover, although violence and spoliation on the sea may rightly be punished, yet an insurgent community of considerable size, possessing a Government capable of controlling or being made answerable for any irregular action on the part of its adherents, is not debarred, merely because it is as yet unrecognised, from adopting and enforcing, otherwise perhaps than by the seizure of foreign persons or their property, such belligerent measures against its adversary as it may deem necessary, even though such measures may hamper or limit the commercial operations of other States; for the reason that it is only by proof of its competency to carry out such measures that it can hope to

(t) This, at any rate, appears to be the deduction from the case of *The United States v. The Ambrose Light* (1885), 25 Fed. 408; Scott 742. The fact that other insurgents in the same interest had attacked Colon, and thereby caused damage to American interests, does not appear to be material.

(u) Westlake, i. 180.

command a recognition of its belligerency (a). It is true that recognition in such a case would not, probably, be long withheld; but recognition, it must be remembered, is largely a question of policy, whilst recognition by one State is not necessarily binding on another. Outside these limits, however, there can be no doubt that States are justified in protecting their subjects against spoliation or interference on the part of unrecognised insurgents. So, in 1873, on the occasion of the seizure by Spanish insurgents of a Spanish squadron at Carthagena, the British Government issued instructions that if the insurgents were guilty of acts of interference with British subjects or affecting British interests, then they should be treated as pirates, but that otherwise they were not to be interfered with; and a similar attitude was also taken up by other States. So, again, in 1902, in the case of the *Crête à Pierrot*, a vessel belonging to insurgents against the Government of Hayti, which was sunk by a German cruiser on the ground of piratical conduct in having carried off from a German vessel in Haytian waters some munitions of war destined for the Haytian Government. Much less can the fact that persons are acting for ostensibly political ends be allowed to serve as a cloak for the commission of acts, which are in fact acts of robbery and murder, against the subjects of other States (b) (c).

THE SLAVE TRADE

"LE LOUIS"

(1817), 2 Dods. 210.

IN 1816 "Le Louis", a French ship, was captured by an English colonial armed vessel, on suspicion of being engaged in the slave trade, and for resisting a demand for visit and search. She was taken to Sierra Leone, and there condemned by a Court of Vice-Admiralty for having been concerned in the slave trade, contrary to French law. Against the order of condemnation an appeal was made to the High Court of Admiralty; by which the decision of the Vice-Admiralty Court was reversed.

Judgment.] Sir William Scott, in giving judgment, after adverting to the fact that the commander of the English vessel had been authorised to seize and detain all vessels offending

(a) Hall, 312.

(b) See the case of *The Magellan Pirates*, 1 Spinks, 81, *supra*, p. 315.

(c) For the special problems arising during the Civil War in Spain, 1936-9, see Padelford, *International Law and Diplomacy in the Spanish Civil Strife*, 1939.

against the slave trade, observed that no British statute, or commission founded on it, could affect the rights or interests of foreigners, unless it was founded upon principles and imposed regulations consistent with the law of nations. The first matter for inquiry therefore was, whether there was, in the present circumstances and by the law of nations, any such right of visitation and search. If there were no such right, and if it was only in the course of an illegal exercise of this right that it was ascertained that "*Le Louis*" was a French ship trading in slaves, then this fact having been made known to him by his own unwarranted acts, the captor could not avail himself of discoveries so produced. At present no nation could exercise a right of visitation and search upon the common unappropriated parts of the sea, save only on the belligerent claim. There being no such belligerent claim, the right of visit, in the present case, could only be legalised upon the ground that the captured vessel was to be regarded legally as a pirate. But slave traffic was not piracy, or even a crime, by the law of nations. A nation had a right to enforce its own municipal rules and navigation laws, so far as such enforcement did not interfere with the rights of others; but it had no right under cover of its municipal regulations to visit and search all the apparent vessels of other countries on the high seas, in order to institute an inquiry whether they were not its own vessels violating its own laws.

This case decides that the right of visit and search on the high seas is primarily a war right, and cannot, in time of peace, be exercised by the public vessels of one State over vessels of another State except in cases of piracy. To this exception must now be added cases where such a right is conferred by treaty (*d*); cases where a State acts in self-defence; and probably also cases where a vessel offending in territorial waters has been immediately pursued and captured on the high seas. Sir W. Scott also laid down that the slave trade, even though treated as piracy in municipal law, could not, for such a purpose, be treated as piracy by the law of nations (*e*). A similar rule was laid down by the Supreme Court of the United States in the case of the

(*d*) Cf. Liquor Agreement of January 23, 1924, between Great Britain and the U. S.

(*e*) The view previously adopted had been otherwise; see *The Amedie*, 1 Acton 240; and *The Diana*, 1 Dods. 95; but the decision in *Le Louis* was subsequently followed in *Madrazo v. Willes*, 3 B. & Ald. 353.

Antelope, 10 Wheat 66, in which the earlier doctrine, that a right of visit and capture could be exercised on proof that the State to which the vessel belonged had prohibited the slave trade, was repudiated (*f*).

Slave Trading and Slavery in International Law.—The slave trade, although at first regarded as a lawful traffic, was ultimately made illegal by most maritime States, notably by Great Britain in 1807 (*g*), and by the United States in 1808; although slavery was still tolerated in certain British possessions, and in some of the United States, as a domestic institution. The slave trade was declared illegal by the Congress of Vienna in 1815. Subsequently it was also made piracy under the municipal laws of the more important Powers; notably by the law of the United States in 1820, and by that of Great Britain in 1821. After the slave trade had thus been declared illegal the question arose as to the right of the public vessels of one State to interfere with this traffic when carried on by vessels belonging to another State. In spite of some earlier decisions to the contrary, it was, as we have seen, finally decided, both by the British and American Courts, that the slave trade could not be regarded as piracy *jure gentium*, and hence that no right of visit and capture could be exercised over foreign vessels engaged in the slave trade. Subsequently a controversy arose between Great Britain and the United States, as to whether a right of visit, as distinct from a right of visit and capture, could be exercised by the public ships of one State over private vessels flying the flag of another, in order to ascertain if the claim to the flag were genuine. Such a right was asserted by Great Britain, but repudiated by the United States (*h*). To meet this need, however, treaties were entered into between the principal maritime Powers, conceding, under certain conditions, and within certain geographical limits, a right of visit and search and a right of sending suspected vessels to the nearest port of their own country for adjudication (*i*).

Among the many humanitarian activities of the League of Nations may be mentioned the Slavery Convention of 1926, to which the British Empire and many other countries have already acceded.

(*f*) A full account of this doctrine and the earlier cases will be found in Taylor, 237.

(*g*) Taking effect from January 1, 1808.

(*h*) See Taylor, 238.

(*i*) The more important of these treaties were the Treaty of London, 1841, between Great Britain, France, Austria, and Russia; and the treaties of 1842 and 1862 between Great Britain and the United States.

THE AGENTS OF STATES IN THEIR EXTERNAL RELATIONS

GYLLENBORG'S CASE

[De Martens, *Causes Célèbres*, i. 97.]

IN 1717 Count Gyllenborg, the Swedish Ambassador to England, was ascertained to be engaged in a plot against the Hanoverian dynasty. He was arrested by order of the English Government, his dispatches seized, and his cabinet broken open. Instead of being immediately sent from the kingdom, he was detained there for a time; this detention being, however, partly due to the fact that similar measures had been adopted by the Swedish Government towards the English Minister in Sweden. Some dissatisfaction at the arrest was at first expressed by other ambassadors accredited to England, but these expressions were subsequently withdrawn when the facts of the case were known; the Secretary of State having pointed out that what had been done was necessary for the peace of the kingdom. In consequence of the mediation of other Powers, both ambassadors were subsequently released.

This incident serves to illustrate that rare class of case in which an ambassador may be subjected to arrest or detention. In such cases the law of nations recognises that even established immunities must yield to the exigencies of self-defence and protection. With respect to the English law on the subject of ambassadorial privilege, the earlier view appears to have been that an ambassador, although otherwise privileged, might be made amenable to the local jurisdiction in respect of crimes such as treason or felony (*k*).

And so it was held in England, in *Leslie's Case*, that an ambassador who raised rebellion against the prince to whom he was sent forfeited his privilege and was liable to punishment (*l*).

But in the subsequent case of *Mendoza*, where the Spanish ambassador was arrested for taking part in a conspiracy to dethrone Queen Elizabeth, the opinion of Gentilis and Hotman—that an ambassador in such a case could not be put to death, but must be remanded to his own Sovereign for punishment—appears to have been acquiesced in (*m*); and this view has ever since been followed.

(*k*) Coke, *Inst.* 4, 153; *St. Com.* ii. 491.

(*l*) *Somers' Tracts* (by Scott), i. 186.

(*m*) Camden, *Imp. Hist. of England*, ii. 497.

Nevertheless, an ambassador who engages in acts dangerous to the safety of the State to which he is accredited may be arrested and detained, as a matter of self-preservation or precaution (*n*); a right which appears to have been recognised by the embassies of other States, in *Gyllenborg's Case* (*o*). But even in such a case the ambassador is not amenable to the jurisdiction of the local Courts, or liable to punishment. In English law it is also a misdemeanour for any person to violate by force or personal restraint any privilege belonging to an ambassador by the law of nations (*p*).

THE MAGDALENA STEAM NAVIGATION CO. v. MARTIN

(1859), 28 L. J. Q. B. 310.

IN this case the defendant, who was the envoy and Minister Plenipotentiary in Great Britain of the Republic of Guatemala and New Grenada, was sued for a sum of £600 alleged to be due from him as a contributory in respect of shares held by him in the plaintiff company. The defendant pleaded to the jurisdiction, alleging his privilege as an ambassador. On demurrer, it was held that the public Minister of a foreign State accredited to the Sovereign, having no real property in this country, and having done nothing to disentitle him to the privileges usually belonging to such public Minister, could not be sued in an English Court for a debt while he remained a public Minister, even though neither his person nor his goods might be touched by the suit.

Judgment.] Lord Campbell, C.J., in delivering the judgment of the Court, after adverting to the facts, pointed out that the true principle was that stated by Grotius in his work "*De Jure Belli et Pacis*"—*omnis coactio abesse a legato debet*. An ambassador was to be left at liberty to devote himself to the business of his embassy. He did not owe even temporary allegiance to the Sovereign to whom he was accredited. He was not even supposed to live within the territory of such Sovereign; and if he had done nothing to forfeit or waive his privilege he was for all purposes supposed to be still in his own country.

(*n*) Hall, 224.

(*o*) As to *Cellamare's Case*, see Taylor, 336.

(*p*) Stephen, Digest of Criminal Law, Art. 130, and the Act of 1708. The United States law is very similar; see Rev. Stat. s. 4062.

For these reasons the rule laid down by all jurists of authority was that an ambassador was exempt from the jurisdiction of the country in which he resided as ambassador. With respect to the statement of Sir Edward Coke that an ambassador was liable on contracts that were good *jure gentium*, Sir Edward Coke, who was so great an authority on municipal law, was entitled to little respect as a general jurist. With respect to the contention that the action could be prosecuted to judgment, for the purpose of ascertaining the amount of the debt, with a view to enable the plaintiffs to have execution when the defendant ceased to be a public Minister, this, although thrown out as a suggestion in *Taylor v. Best*, 14 C. B. 487, was supported by no authority, and would vitiate the principle laid down by Grotius. It was difficult indeed to see how the writ could be served, for the reason that an ambassador's house was considered to be part of the territory of his Sovereign. Nor could he be stopped in the street, for the reason that he might be proceeding on the business of the embassy. Moreover, to have to defend such an action would put serious constraint on the ambassador. Nor would it be of any material benefit to the plaintiffs, for the reason that even if judgment were obtained against the ambassador, no execution could be had upon it whilst he remained ambassador, nor for a reasonable time after his recall. The first and third sections of the Act 7 Anne, c. 12, were only declaratory of the law of nations, and were in accordance with the principle just enunciated. The proceedings described in the third section were not confined to such as directly touched the person or goods of the ambassador, but extended to such as in their usual consequences would have this effect.

The inconveniences alleged to arise from the recognition of such an immunity were not likely to arise. A joint contractor could, in such circumstances, be sued alone. It was open to any one contracting with an ambassador to insist on a surety who could be sued. Moreover, the resource was always open to a person aggrieved of making a complaint to the Government by which the ambassador was accredited. Although it had not previously been expressly decided that a public Minister duly accredited to the Crown was privileged from liability to be sued

here in all civil actions, yet this appeared to follow from well-established principles.

With respect to an ambassador's liability in civil cases, it had been suggested by Coke that an ambassador might be held liable on "contracts that be good *jure gentium*", and for a long time this view appears to have been accepted as correct. At length, in 1708, the question was definitely raised in the case of *The Czar's Ambassador*, who was arrested in London for debt and forced to give bail. On his complaining of this indignity, those concerned in the arrest were brought up before the Privy Council and subsequently prosecuted in the Court of Queen's Bench at the suit of the Attorney-General. At the trial the question of law was reserved for argument, but never finally determined. Meanwhile, in order to mitigate the incensement of the Czar, an Act, 7 Anne, c. 12, was passed prohibiting any such proceedings in future. This statute, after declaring the arrest of the Czar's ambassador to have been "contrary to the law of nations", and vacating all proceedings thereunder, provides that "all proceedings for the arrest or imprisonment of a foreign ambassador or minister, or the domestic servant of any such ambassador, or for the seizure of the goods and chattels of any such person, shall be null and void" (s. 3); it further inflicts penalties on any person who prosecutes any such process (s. 4); but at the same time declares that no merchant or trader within the meaning of the bankruptcy laws, in the service of an ambassador, shall have the benefit of the Act; and finally provides that no person shall be liable to any penalty for arresting the servant of an ambassador or Minister, unless the name of such servant is registered in the office of one of the principal Secretaries of State (s. 5) (q). The general effect of this statute, which has been said to be declaratory at once of the common law (r) and of the law of nations (s), appears to be that no action or other proceeding will now lie either against the person or property of an ambassador or other diplomatic agent (t) representing a foreign Sovereign and accredited to this country, during the continuance of his office or for a reasonable time afterwards.

In *Taylor v. Best*, 14 C. B. 487, however, it was held that if an ambassador attorned to the jurisdiction he could not afterwards set up his privilege; although it was at the same time stated that even if judgment were given against him no execution could issue against his person or property.

(q) As to the interpretation of this section, see *Triquet v. Bath*, 3 Burr. 1478.

(r) *Viveash v. Becker*, 3 M. & S., at p. 292.

(s) *Magdalena Co. v. Martin*, *supra*, p. 326.

(t) *Engelke v. Musmann*, [1928] A. C. 433.

Hence if an ambassador appears in a suit without protest, or if he himself institutes proceedings, he will be deemed to have waived his privilege. Nor does it seem that any proof of his Sovereign's consent would be necessary for this purpose. If, moreover, he himself initiates the proceedings, then he will lay himself open to any cross-claim arising out of the same transaction, but not to any counterclaim arising out of some separate transaction (*u*); although even in such a case he would still not be liable to execution.

In *Taylor v. Best* a doubt had been expressed as to whether an ambassador who had engaged in commercial transactions could not be made a defendant for the purpose of ascertaining the amount of his liability, with a view to subsequent execution after his privilege had expired.

But this doubt has now been set at rest by the decision in *Magdalena Steam Navigation Co. v. Martin*. The immunity of the property of an ambassador would not extend to real property owned by him in his personal capacity within the jurisdiction; whilst property in the hands of third persons would be liable to the same extent as in the case of a foreign Sovereign.

The immunity of the diplomatic agent involves exemption from being sued in the Courts—he may be under a legal liability, though no action can be brought. Thus, where a Peruvian diplomat had waived his immunity and had damages awarded against him in respect of a motor accident, the insurance company with which he was insured unsuccessfully sought to maintain that it was entitled to rely on his immunity, *Dickinson v. Del Solar*. [1930] 1 K. B. 376. Hence also when the mission has been definitely terminated a former diplomatic agent can be sued in respect of transactions which occurred during the existence of the mission. Thus in 1925 the French Court of Appeal at Paris held the former Secretary of the U.S.A. embassy in Paris liable for damages for a motor accident caused while he still enjoyed immunity, *Laperdrix and Penquer v. Kouzouboff and Belin*, Annual Digest, 1925-6, No. 241.

R. v. A B (R. v. KENT)

[1941] 1 K. B. 454.

THE appellant in this case before the Court of Criminal Appeal was a code clerk who had been employed at the embassy of a foreign State in England. On May 21, 1940, he was dismissed

(*u*) Dicey. Conflict of Laws, 201.

from the embassy service, and, on the same day, the ambassador having waived any rights of diplomatic privilege, he was arrested on charges under the Official Secrets Acts and for theft of documents.

The appellant claimed diplomatic privilege, but Tucker, J., disallowed the claim, and the appellant was convicted and sentenced to seven years penal servitude.

The appellant claimed that diplomatic privilege was not merely a privilege accorded to the ambassador but extended to the members of his staff as their own independent privilege, and that such privilege endures for a reasonable period after cessation of service at an embassy.

The Court of Criminal Appeal held that the privilege claimed is a privilege derived from, and, in law, the privilege of, the ambassador, and, ultimately, of the State which sends the ambassador. From the moment it is waived by the ambassador it therefore ceases. Neither *Musurus Bey v. Gudban* (a), nor *Re Suarez* (b), is any authority for the proposition that a dismissed official in whose case the ambassador has waived his privilege is entitled to a reasonable time to withdraw from the country. The privilege was originally based on the comity of nations, but in English law is now embodied in the Act of Queen Anne's reign. It would be a strange application of the comity of nations if, notwithstanding dismissal and waiver of privilege, a diplomatic agent could commit crimes with impunity against the country in which he was serving. The Official Secrets Acts applied to actions done by a diplomatic agent in connection with the business of the embassy, and the appellant had stolen the document within the meaning of the Larceny Act, 1916. The conviction was therefore upheld.

Where diplomatic privilege was waived by an ambassador with the consent of his Government at the initiation of proceedings brought for administration of an estate, it was held in *Re Suarez, Suarez v. Suarez*, [1918] 1 Ch. 176, that such waiver extends to all subsequent proceedings, and an order could be made after his diplomatic privilege had ceased, granting leave for a writ of sequestration to issue against his property for his failure to obey order for payment into Court.

(a) [1894] 2 Q. B. 352.

(b) [1918] 1 Ch. 176.

MACARTNEY v. GARBUTT AND OTHERS

(1890), L. R. 24 Q. B. D. 368.

THE plaintiff was a British subject, who had been appointed English secretary to the Chinese Embassy in London, and had been received in that capacity by the British Government. His name had been submitted to the Foreign Office in the usual way, and his position as a member of the embassy recognised without reservation. The defendants had levied a distress on the furniture of his house under a claim for parochial rates; the plaintiff thereupon paid the claim under protest, and now sought to recover the amount so paid. It was conceded that if the plaintiff were a foreigner he would be entitled to exemption; but, being a British subject, it was argued that he remained subject to the laws of his own country, and did not come within the exemption clause of the Act under which the rates were claimed, as being "a person not liable by law to pay such rates". It was held that a British subject, accredited to Great Britain by a foreign Government as a member of its embassy, was, unless received on express condition that he should remain subject thereto, altogether exempt from the local jurisdiction; that inasmuch as no such condition had been imposed on the plaintiff at the time of his reception, his furniture was privileged from seizure; and that he was therefore entitled to judgment for the amount claimed, and costs.

Judgment.] In his judgment, Matthew, J., pointed out that the plaintiff had been received as a member of the Chinese Embassy without any reservation. In support of the contention that the plaintiff as being a British subject, remained liable to the local law, reliance had been placed on certain passages from Bynkershoek's *De Foro Legatorum*, which, it was said, showed that the Minister of a foreign State remained subject to the laws of the State to which he owed allegiance. But the true view of the learned author appeared to be that an envoy was entitled to exemption from the local jurisdiction in all that related to his public functions; and this seemed to be the view of later writers. If such were the rule, then the plaintiff would be protected from the seizure in question, which unquestionably interfered with the performance of his duties as a member of the embassy. But there was also another principle which appeared to afford the

plaintiff the protection he claimed. Bynkershoek, whilst recognising the right of the State to impose such conditions as might be thought fit upon the reception of a member of a foreign embassy, yet stated that if he were received without reservation the condition was tacitly implied that he was to enjoy the full *jus legationis*. This principle had, it seemed, and with much good sense, been extended by later writers to the case of an envoy accredited to his own Government; and this view was also borne out by the statements of Wheaton, Calvo, and Phillimore. As no such reservation was made in the present case, the plaintiff was clearly entitled to the exemption claimed.

This decision makes it clear that in the United Kingdom the privilege of embassy will extend even to a British subject, unless he has been received on the condition of remaining subject to the local law; that this privilege attaches not only to the ambassador himself but to all other members of the embassy who have been received on this footing; and that, according to the British practice, the payment of rates and taxes in respect of any building occupied by a member of the embassy cannot be enforced by suit or distress (*c*). But both in this matter, and in the matter of the exemption of an ambassador who engages in trade, the English law appears to concede a wider privilege than that recognised by many other States (*d*).

In *Musurus Bey v. Gadban*, [1894] 2 Q. B. 352, it was held that the immunity of an ambassador from civil process extends to such reasonable period after his recall as may be necessary to enable him to wind up his business; although it was at the same time held that the Statute of Limitations would not run against a creditor during the period of such immunity. And the same privileges attach to such members of the embassy as are invested with the diplomatic status, such as secretaries of legation, councillors and attachés (*e*).

(*c*) See also *Parkinson v. Potter*, 16 Q. B. D. 152.

(*d*) Cf *Re Marchese Di Sorbello* (Italy), 1941, Annual Digest 1941-2, No. 108.

(*e*) See *Parkinson v. Potter*, 16 Q. B. D. 152, and *Hopkins v. De Robeck*, 3 T. R. 79. But this will not apply where the employment is merely colourable, as in the case mentioned in *Parkinson v. Potter*, where a Christian clergyman was supposed to be a domestic chaplain to the ambassador of the Emperor of Morocco. See also *Re Cloete*, 65 L. T. 102.

The exemption from civil proceedings, under the Act of 1708, also applies to persons who are merely in the service of an ambassador; provided that the service is genuine, and that such persons are not traders within the meaning of the bankruptcy laws (f). But with respect to criminal proceedings the English law does not appear to recognise any exemption, save on the part of the ambassador himself and persons who are actually members of the embassy.

In 1827, in a case where an assault had been committed outside the embassy by a coachman in the service of the United States Ambassador, the offender was arrested in the stable of the embassy. In the discussion which followed the Foreign Office appears to have denied that an ambassador's servants were exempt from arrest and to have asserted a right of arrest even within the precincts of the embassy; merely admitting that as a matter of courtesy notice should be given to the Minister, so that the offender might voluntarily be handed over, or arrested at a time convenient to the Minister (g).

**IN THE MATTER OF A REFERENCE AS TO THE POWERS
OF THE CORPORATION OF THE CITY OF OTTAWA
AND THE CORPORATION OF THE VILLAGE OF
ROCKCLIFFE PARK TO LEVY RATES ON FOREIGN
LEGATIONS AND HIGH COMMISSIONERS' RESI-
DENCES**

Canada Law Reports, [1943] S. C. R. 208; Annual Digest, 1941-2,
Case No. 106.

AFTER the establishment at Ottawa of foreign legations the City of Ottawa continued to levy rates on the buildings occupied as legations by France, the U.S.A., and Brazil, and on the residences of the High Commissioners of the United Kingdom and Australia, and the Corporation of Rockcliffe Park levied rates on the U.S.A. legation at that place. These rates were for some time paid as a matter of international courtesy by the Government of Canada, but on March 19, 1942, the Governor-General of Canada referred to the Supreme Court of Canada the question whether it was within the powers of the Corporations of Ottawa and of Rockcliffe Park to levy such rates.

The Court held that as regards the property owned by His

(f) See s. 5; *Triquet v. Bath*, 3 Burr. 1478; and *Heathfield v. Chilton*, 1 Burr. 2015; but see also *Novello v. Toogood*, 1 B. & C. 554.

(g) Wharton, Dig. i. 650; Taylor, 346; Moore, Dig. iv. 656.

Majesty and the Commissioners for the United Kingdom and Australia, it was exempt as Crown property under the Ottawa Assessment Act. As regards the foreign legations, three of the five Judges of the Court held that no rates could be levied on the property of foreign States. The two other Judges differed, in holding that assessments might be made, but agreed that if payment was refused there could be no enforcement.

One of the general principles of international law accepted and adopted by the laws of England, and which, if not modified by statute, is part of the law of Ontario, said Duff, C.J., was that a foreign minister owed no allegiance to the receiving State and was not subject to the laws of that State. It was his duty to respect those laws and in certain cases to comply with them, for he must refrain from actions prejudicial to the well-being of the country in which he dwells.

Inviolability of the ambassador's residence is one of the diplomatic immunities recognised under English law and is acknowledged by all civilised nations. Moreover the principle of immunity of the property of a foreign State devoted to public use extends to property devoted to diplomatic uses. *The Parlement Belge* (1880), 5 P. D. 197 (h), etc.

Some rates, such as water rate, are in the nature of payments for services rendered, in which case there is no obligation to supply the foreign legation gratuitously. But rates may also be, as they were in the case before the Court, of the nature of local taxes constituting a charge on land and the occupation of real property.

After considering *Parkinson v. Potter* (1885), 16 Q. B. D. 152 and other English authorities, the Chief Justice held that in England taxes and rates imposed by statute in general terms in respect of the occupation or ownership of real property are not recoverable from diplomatic agents in respect of real property occupied or owned by them or their States, and occupied or used for diplomatic purposes. There is no liability to pay, nor effective charge created upon the property. The property is not subject to process nor to visitation by Government officers.

In this case the Supreme Court of Canada recognised in wide terms the immunity of foreign legations from liability to assessment for local rates. The point is stated shortly in the judgment of Taschereau, J., that in practically all the leading countries of the world it is a settled and accepted rule of international law that property belonging to a foreign government, occupied by its accredited representatives, cannot be assessed and taxed for state or municipal purposes.

The Court based the immunity of legation not on the doctrine of extritoriality in its extreme form, which, as it pointed out, had been rejected by the Privy Council in *Chung Chi Cheung v. The King*, [1939] A. C. 160 (i), but on the alternative principle suggested by Marshall, C.J., that the Minister is considered as in the place of his Sovereign and the immunity is impliedly granted by the receiving State. The accrediting Sovereign does not intend to place his Minister under the authority of the receiving State, and by its consent to receive him, there is implied a consent that he shall have those privileges which his principal intended him to have. Amongst these privileges is immunity of legation.

The Agents of a State.—The plenary representation of States in their external relations has already been discussed (j). But besides its titular head, its Government, or its department of Foreign Affairs, each State may also have a variety of subordinate agents, who represent it only for a particular purpose, or in relation to some particular State. Amongst these we may include: (1) Diplomatic Agents, who are publicly accredited to act as the official representatives of a State in foreign countries, and who are entitled to the privileges of inviolability and extritoriality to the extent indicated below. (2) Commissioners appointed for special objects, such as the delimitation of boundaries, or the transaction of administrative business, whose position does not appear to be the subject of any definite usage; but who, from the nature of their office, would seem to be entitled merely to courteous treatment and to special protection where the nature of the business on which they are engaged requires this (k). (3) Officers in command of the armed forces of a State, who possess, according to their position, a certain authority to bind the State, as well as certain privileges and immunities which have already been described; and who, in so far as they act in their capacity as agents for their State, cannot be made amenable to the laws or jurisdiction of any other State (l). (4) Consuls, who are agents appointed to watch over the commercial interests of the State or its nationals in foreign parts, but who are not, save in exceptional cases, entitled to diplomatic privileges or immunities (m). (5) Finally, there may be agents, not publicly acknowledged, who, as

(i) *Supra*, p. 288. (j) *Supra*, p. 82.

(k) Hall, 371; Taylor, 354; Wharton, Dig. i. 648.

(l) Hall, 368.

(m) *Infra*, pp. 344-9.

between themselves and the Government to whom they are accredited, are entitled to the usual diplomatic immunities, but who cannot claim these as against private persons to whom their public character has not been made manifest (n). It would seem that agents appointed to represent a State within the territory of a *de facto* Government are in the same position (o).

Diplomatic Agents.—Diplomatic agents differ in character according to the nature of their mission, which may be either ordinary or extraordinary, general or special. Thus, a diplomatic agent may be accredited to a particular State for the purpose of representing his Government in some ceremonial function, or of making some formal notification, or of carrying out some particular negotiation or arrangement. Or, he may be accredited for the purpose of representing his Government at some congress or conference of States. Or, finally, he may be accredited to some particular State for the purpose of residing there, and representing there, generally, his own State. Such permanent embassies appear to have had their origin in the fifteenth century; they became general in the latter part of the seventeenth century, whilst at the present time they may be regarded as an essential part of the international system (p). Members of the Permanent Court established by the The Hague Peace Conference of 1907 are, when acting in the exercise of their judicial functions outside their own country, also entitled to diplomatic privileges and immunities as also were judges of the P. C. I. J. and delegates to the League of Nations. The right to send and receive diplomatic envoys belongs to every sovereign State; but a semi-sovereign State only possesses this right in so far as it is consistent with the relation in which it stands to the superior Power; whilst a deposed Sovereign, or a community recognised as belligerent, can act only through political agents, who are not entitled to diplomatic privileges (q). It is sometimes said that there is a right to diplomatic intercourse; but really this rests only on grounds of convenience and comity. The temporary suspension of diplomatic relations is, however, occasionally resorted to as a mode of indicating a sense of unfriendly or improper action on the part of another State.

Glasses of Diplomatic Agents and Precedence.—In order to obviate disputes as to precedence, it was agreed by the parties to the Congress of Vienna, 1815, that three different grades or classes of diplomatic agents should be recognised; whilst another class was subsequently added by the Congress of Aix-la-Chapelle, 1818. There are now, therefore, four classes or grades of diplomatic agents. (1) Ambassadors proper, including Papal legates and nuncios, who are deemed to represent

(n) Hall, 370.

(o) But see Westlake, i. 276.

(p) See Oppenheim, i. 597; and *Encyclopædia of the Laws of England*, 3rd ed., iv. 795.

(q) Oppenheim, i. 602.

immediately the person and dignity of the Sovereign or head of their State, and who are entitled to personal communication with the head of the State to which they are accredited; (2) Ministers plenipotentiary and envoys extraordinary, including Papal internuncios, who are accredited to the head of the State, but who are not regarded as immediately representing the person and dignity of the Sovereign or head of their own State; (3) Ministers resident, who are also accredited to the head of the State, but who rank below the last class in point of official position and honours; and (4) *Chargés d'affaires*, who are accredited only to the Minister of Foreign Affairs (r). But the distinction between these classes is for the most part only a formal or ceremonial distinction; and all classes are equally entitled to the privileges of embassy (s). The term "ambassador" is in fact often used to designate all classes of diplomatic agents, and will be so used in the succeeding sections of this note. Each State sends such grade of representative as it may think fit. Ministers of the same grade take precedence according to the order of the notification of their arrival (t); but in Catholic States the precedence is commonly accorded to the Papal nuncio. The whole body of foreign Ministers accredited to any State constitute the *corps diplomatique*, of whom the senior member is called the *doyen*, and whose function it is to see that diplomatic privileges are duly observed.

The Appointment of Ambassadors.—Although the appointment of an ambassador necessarily rests with the accrediting State, yet this is subject to his acceptance by the other, who will be entitled to decline to receive him if for any just cause he is not regarded as acceptable (u). In practice this difficulty is commonly obviated by making confidential inquiry before an appointment is announced. But to decline to receive an envoy after informal acquiescence, or even to decline, except for just cause, to receive an envoy after he has been formally appointed, would constitute a breach of international courtesy which would probably warrant a formal suspension of diplomatic relations. A diplomatic agent, when accredited to a particular State, is ordinarily furnished with letters of credence, which specify his name and rank, bespeak credit for his communications, and imply an authority to transact all such business as falls legitimately within the scope of his mission. When he is charged with the conduct of some particular negotiation, he is furnished also with an additional full power, which defines the limits of his authority in relation to the matter in question. When he is accredited to some conference or congress of States, he is usually furnished with a limited full power, which confers authority to

(r) *Chargés d'affaires*, again, may be either *ad hoc*, where they are expressly accredited as such, or *ad interim*, where they are promoted temporarily to that position: see Taylor, 321.

(s) Hall, 356; Oppenheim, i. 604.

(t) This was also agreed to by the Congress of Vienna, Art. 4.

(u) For instances of such refusal, see Hall, 353; Taylor, 327.

negotiate with each and all of the other States there represented (a). He is also provided with a passport, attesting his name and character; and with such instructions from his own Government as may be necessary. His privilege of inviolability attaches from his entry into the State to which he is accredited; but his right to exercise his functions as well as his right to diplomatic privilege accrues only from the time at which his credentials are formally presented; or, in the case of a congress or conference, from the time when the full powers of the respective envoys, or copies thereof, are duly exchanged (b). In cases where his character as diplomatic agent comes in question in a Court of law, an official communication from the Foreign Office or Minister of Foreign Affairs is usually accepted as sufficient proof of character (c).

Termination of Mission.—The mission of an ambassador may be terminated by his recall by his own Government; by the expiration of his authority or by the fulfilment of the object of the mission where that object is special; by his dismissal or expulsion by the State to which he is accredited; by the interruption of amicable relations between the two; or by the death of either Sovereign. On a change of Government by revolution, the better opinion would appear to be that letters of credence on either side should be renewed (d).

The Functions and Duties of Resident Ambassadors.—The functions and duties of an ambassador deputed to reside in a foreign State are shortly these: (1) He constitutes the local medium of communication between his own State and that to which he is accredited; he negotiates treaties and conventions, and assists generally in maintaining friendly relations. (2) It is his duty to watch over the interests of his State, and to keep his Government informed as to the political, commercial, and industrial conditions of the country in which he resides; and more especially as to the position of its armed forces, the state of its finances, and the course of its policy both with respect to his own and other States. It is for this reason that an ambassador has been called "the eye and the ear" of his State. (3) It is also his duty to watch over the interests of his own countrymen within the limits of the State in which he resides, to see that they obtain justice and protection, and to act as a medium of communication between them and the local Power. This protective supervision may under certain circumstances, and with the assent of the Government, be extended to the nationals of another State. (4) Beyond this, an ambassador may grant passports and administer oaths (e); he may legalise for use in his own

(a) A general full power, which is unlimited in its scope, is now rare, or even obsolete. As to the character of these instruments, see Taylor, 329; and Oppenheim, i. 608.

(b) Hall, 356; Taylor, 330.

(c) Cf. *Engelke v. Musmann*, [1928] A. C. 433; *Re Baiz*, 135 U. S. 403; Scott, p. 473.

(d) Hall, 359; Taylor, 348; Oppenheim, i. 639.

(e) As to the English law on this point, see 52 Vict. c. 10, s. 6.

State wills and other unilateral acts, as well as contracts made by or between members of his suite, or nationals of his own State (*f*); he may also legalise marriages between members of his suite, and, by the municipal law of some systems, marriages between parties both or one of whom are nationals of his own State (*g*). He must respect the laws and customs of the country in which he resides; and is debarred from receiving presents. He should not interfere in local politics; otherwise he may render himself liable to recall or dismissal (*h*).

The Ambassador's Staff and Suite.—The staff of an embassy or legation usually comprises, in addition to the ambassador, a secretary of legation, councillors, attachés, and often other officers (*i*). All members of the staff of an embassy or legation, even though not personally accredited, are entitled to diplomatic privileges; and their names are notified to the Foreign Office of the receiving State, whilst the more important members are also presented to the Foreign Minister. The ambassador's suite or retinue comprises members of his family personally resident with him; persons in the fixed service of either the ambassador himself or members of the embassy; and couriers. But such persons, although commonly regarded as exempt from the local civil and criminal jurisdiction, possesses no independent immunity, and can only claim privilege through, and in the right of, the ambassador himself, who may waive it if he thinks fit. A list of members of the suite is also usually furnished to the local authorities. With respect to the immunity of servants, however, the practice of States is not altogether uniform (*k*). Nor in principle does there seem any valid reason for thus exemption, which is often waived in practice (*l*). But couriers and messengers, passing with despatches between the ambassador and his own Government or other legations, are clearly entitled to inviolability of person and freedom of passage, subject to their official character being duly attested (*m*).

Privileges and Immunities.—Shortly, the privileges and immunities of an ambassador, in relation to the State to which he is accredited, are: (1) inviolability of person; (2) a general exemption from the local criminal jurisdiction; (3) an exemption also from civil jurisdiction, the precise limits of which are not so well ascertained,

(*f*) Hall, 236; Taylor, 347.

(*g*) As to the English law on this subject, see the Foreign Marriages Act, 1892. But the Courts of other States are not bound to recognise such marriages when their own subjects are concerned; see Taylor, 348, and cases there cited.

(*h*) Wheaton (Keith), i. p. 475.

(*i*) A short account of the British Diplomatic Regulations will be found in *Encyclopædia of the Laws of England*, 3rd ed. iv. 797.

(*k*) Taylor, 346; Oppenheim, i. 633. Some countries refuse to recognise any immunity on the part of servants who are at the same time subjects of the local Power.

(*l*) Hall, 230.

(*m*) Hall, 371.

but which includes a privilege of not being compellable to appear before the local Courts even as a witness, (4) exemption from taxation, which does not, however, ordinarily include exemption from rates levied on his residence in respect of municipal services (n), or exemption from tolls or postages, but which will generally include an exemption from customs duties as regards articles imported for his own personal use (o). And the same privileges attach to other members of the legation. An immunity from local jurisdiction is also enjoyed by members of the ambassador's family living with him, and by persons in his permanent service within the limits already indicated. His residence is also inviolable, although this right is not altogether unqualified. An ambassador retains his domicile in his own country and children born to him in the country to which he is accredited are not deemed to be subjects thereof.

(1) *Inviolability of Person*—The inviolability which attaches to the person of an ambassador confers a right, apart from any question of jurisdiction or judicial proceedings, to freedom from arrest or molestation as against the receiving State or its officials, save, perhaps in cases where arrest may be necessary to the safety of the State or for the purpose of his expulsion. It also confers a right to immunity from molestation or personal indignity as against private persons save in cases where the ambassador is himself the aggressor. It is with a view to the safeguarding of this right that the municipal law of many countries make special provision for the punishment of offences against ambassadors. Any infringement of this right will constitute an international delinquency of the gravest kind.

Thus the assassination by the Chinese, in 1900 of the German Minister, Baron von Ketteler, and of the secretary of the Japanese Legation, led to the occupation of Peking by the allied forces, and was only atoned for by the performance of a number of expiatory acts on the part of the Chinese Government, including the punishment of the offenders, the payment of an indemnity, the adoption of adequate safeguards to prevent the recurrence of like outrages in the future, and the dispatch of a special mission to Berlin.

(2) *Exemption from the Local Jurisdiction*—The immunity of an ambassador from the local criminal jurisdiction is now universally recognised, to the extent, at any rate, that he cannot be tried for a criminal offence by the Courts of the State to which he is accredited. At the same time he is, as a matter of comity, expected to observe the

(n) As to the United States practice, Taylor, 345. Not all States seem to allow exemption from taxation to their own subjects received as representatives of foreign powers. *Re Marchese Di Sorbello*, Italy, Central Commission for Direct Taxes 1941 (Annual Digest, 1941-2, Case No. 108).

(o) Taylor, 346.

local administrative and police regulations; and in the case of grave offences he might, it seems, be made amenable to the laws of his own country. But, the only remedies available to the receiving State would appear to be a request for the offender's recall; or an order for his immediate expulsion; or, in cases of extreme gravity, the provisional arrest and detention of the offender pending a demand for satisfaction (p). With respect to civil jurisdiction, it would seem that in practice the immunity of an ambassador from local civil jurisdiction must be taken to depend on the law of the State to which he is accredited, always assuming that this does not curtail his immunity in such a way as to interfere with his official position (q). In certain countries, notably Italy, there has been a not unreasonable tendency to hold diplomatic agents liable if the transaction sued on is of a purely private character, e.g., *Comina v. Kite*, Annual Digest, 1919-22, Case No. 202; *Perrucchetti v. Puig y Cassaura*, Annual Digest, 1927-8, No. 247. The case of *Harrie Lurie v. Steinmann*, Annual Digest, No. 246, may be reconcilable with these cases, as it may have turned on the interpretation of the special Treaty with the Papal See. The distinction drawn between private law and public law activities is drawn both in the case of diplomatic agents, and other activities of the foreign States themselves. The Italian practice has been followed in decided cases in Belgium, Roumania, Egypt, Sweden. and Switzerland, and there is some authority on its side in France. *Slomnitzky v. Trade Delegation of U.S.S.R.*, 1932, Annual Digest, 1931-2, No. 86; *The Roumanian Bank of Commerce and Credit v Poland*, 1920, Scott and Jaeger, p. 427.

(3) *The Ambassador's Residence*.—The building and grounds within which an ambassador resides and carries on his mission, by whomsoever owned, are also exempt from the local jurisdiction, to such an extent, at any rate, as may be necessary to secure the free exercise of his functions. The building, its appurtenances and contents, are also exempt from all forms of taxation, whether general or local; although service rates ought to be paid except where this obligation is waived by mutual arrangement (r). The ambassador's residence is also exempt from all ordinary forms of legal process (s); nor is there, in general, any right of entry on the part of the local authorities, without the ambassador's consent (t). At the same time this immunity cannot, save, perhaps, in the special cases mentioned below, be set up in derogation of the safety and public order of the territorial Power (u). Hence, if offenders, who would otherwise be subject to the local juris-

(p) Hall, 223; Taylor, 336.

(q) Westlake, i. 267.

(r) Taylor, 345. *Ottawa Legations Case*, 1942, *supra*, p. 333.

(s) For an interesting account of a dispute between Germany and the United States, in Mr. Wheaton's case, as to the right to enforce a tacit hypothec over goods found in the house on the expiration of an ambassador's tenancy, see Taylor, 341.

(t) Taylor, 344; *U. S. v. Jeffers*, 4 Cranch C. C. 704; Scott, 497

(u) Taylor, 342.

diction, either take refuge or are detained within the embassy, their surrender may be demanded, and, if necessary, enforced by the local authorities; and this whether the offence was committed within the precincts of the embassy or not (a), and whether it is of a political or non-political character (b).

Alleged Right of Asylum.—With respect to the right—which was often claimed in the past and is even now sometimes asserted—of granting asylum in legations to strangers or persons not forming part of the ambassador's suite, it is true that there is a right to afford shelter, either to subjects of the State to which the legation belongs or to other persons, as against mob violence or other unlawful outrage; but this right is not, of course, peculiar to legations, although their protection is more often sought, because more likely to prove effectual. But in the sense of a right to afford protection to political or other offenders, as against the local Government or its legitimate agents, it has (except for certain arrangements peculiar to South America and having nothing to do with international law) fallen into desuetude (c).

*THE POSITION OF DIPLOMATIC AGENTS AS REGARDS
OTHER STATES THAN THAT TO WHICH ACCREDITED*

WILSON v. BLANCO

(1889), 56 N. Y. Sup. Court 582.

THE defendant in this case had been duly accredited as Minister by the Government of Venezuela to the French Republic, and was in that character recognised by the Government of the United States. Whilst passing through New York on his way to Paris he was served with process in the local Courts in connection with a civil claim against him, and in default of appearance judgment was entered against him. Subsequently an application was made to vacate the judgment, on the ground of diplomatic privilege, and this application was granted by O'Gorman, J. On appeal this order was affirmed, on the grounds and for the reasons assigned in the Court below.

Judgment.] O'Gorman, J., in delivering judgment, observed that it was conceded on the authority of *Holbrook v. Henderson*,

(a) Hall, 229.

(b) As to the British practice with respect to arrests. see p. 333, *supra*; and on the subject generally, Hall, 229; Westlake, i. 271.

(c) Oppenheim, i. 621 n.

4 Sand. S. C. 626, that the defendant could not have been lawfully arrested in New York; but the Court in that case had gone further and had expressed the opinion that the privileges of ambassador extended to immunity against all civil suits sought to be instituted against him, whether in the Courts of the country to which he was accredited, or in those of a friendly country through which he was passing on his way to the scene of his mission; such privilege being conceded to the ambassador both as the representative of his Sovereign and as being necessary to the free exercise of his diplomatic duties. This opinion was in accordance with the views of the writers on international law, and also with the fiction of extritoriality, under which an ambassador was assumed to be outside the country to which he was accredited, and to be still resident in his own country. If he had contracted debts and had no real property in the country to which he was sent, then he should be asked to make payment, and in case of refusal, application should be made to his Sovereign; in addition to which he might also be proceeded against in the Courts of his own country, in which he was considered to retain his original domicile.

The view adopted in this case, as to the privilege of an ambassador when in a State to which he is not accredited, would appear to be sound in principle; although it cannot be said, so far, that there is any settled usage on the subject. The English law, although less explicit on the question of technical right, is virtually the same in effect.

In *The New Chile Gold Mining Co. v. Blanco*, 4 T. L. R. 346, an action was commenced in the English Courts against the same defendant, who was then Minister of Venezuela and resident in Paris; and an order for the service of the writ outside the jurisdiction having been made, an application was made to the Queen's Bench Division to set this order aside. In the result, and although the general question of jurisdiction was not decided, the Court set aside the order, and held, that as a matter of discretion, it would not allow service of a writ out of England on the Minister of a friendly Power accredited to a foreign State. Manisty, J., indeed, expressed the opinion that the immunity of an ambassador, as recognised by the Courts of this country, would be violated by compelling an ambassador accredited to a foreign country to appear and defend himself in Great Britain.

The Position of an Ambassador with respect to other Powers.—Although the privileges of embassy do not strictly avail as against other Powers than that to which the ambassador is accredited, yet, in practice, it is usual in time of peace for third Powers, as a matter of comity, to concede to an ambassador a right of innocent passage (*d*).

CONSULS

VIVEASH v. BECKER

(1814), 3 M. & S. 284.

THE defendant, a merchant resident in London, was arrested for a debt of £548, and compelled to give a bail bond. A rule *nisi* for delivering up of the bond was obtained on his behalf, on the ground that he had been appointed consul to the Duke of Oldenburg, and was acting in this capacity; but a subsequent application to make the rule absolute was refused.

Judgment.] In delivering judgment, Lord Ellenborough expressed the opinion that a consul was entitled only to a limited privilege, such as safe-conduct. If this was violated, his Sovereign had a right to complain; but it had been laid down that a consul was not a public Minister, and was not entitled to the *jus gentium*. The Act of Anne (*e*), which must be considered as declaratory not only of what the law of nations was, but also of the extent to which it should be carried, only referred to ambassadors and public Ministers, and made no mention of consuls. A different construction, moreover, would lead to enormous inconvenience, for consuls had the right of creating vice-consuls, and they, too, must have similar privileges. Thus a consul might appoint a vice-consul in every port, to be armed with the same immunities, and this might become the means of creating an exemption from arrest indirectly, which the Crown itself could not grant directly. Under these circumstances it was held that no privilege existed, that the defendant was liable to arrest, and that the application must be refused.

This case is cited as illustrating generally the difference between the status of a consul and that of a diplomatic agent; and also as

(*d*) Taylor, 330; and especially the case of Mr. Soulé.

(*e*) (1708), 7 Anne, c. 12.

containing a statement of the reasons on which the English Courts base their refusal to recognise any immunity on the part of consuls from the ordinary jurisdiction; reasons which, as we shall see, have exercised a considerable influence on English mercantile policy. A consul is strictly only a commercial agent; he has no diplomatic character, and is not entitled to immunity from the local civil or criminal jurisdiction (*f*).

In *The Anne*, 3 Wheat. 435, it was laid down that although a consul was in some sense a public agent, he was clothed with authority only for commercial purposes, and although he might interpose claims on behalf of subjects of the country for which he acted, yet he was not to be considered as the agent of his Sovereign, or as entrusted by virtue of his office with authority to represent him in his negotiations with foreign States (*g*).

It needs to be noticed, however, that by special consular conventions concluded between many foreign States that the privileges and powers of consuls, and especially of professional consuls, as distinct from local merchants who may be invested with consular functions, are greatly enlarged. Hitherto Great Britain has, for the reasons given in the judgment in *Vircash v. Becker*, and owing to a disinclination to establish any further exception to the rule that every inhabitant is amenable to the ordinary law and jurisdiction (*h*), held aloof from these arrangements. Hence the legal position of foreign consuls in England, and of British consuls in foreign countries, does not, save for certain minor privileges and exemptions resting on comity and usage, and certain powers occasionally conceded by treaties of commerce, differ greatly from that of other resident aliens. Nor under the British system, except in the matter of personal income tax, is any distinction drawn between professional consuls and mercantile consuls. Throughout the British dominions foreign consuls are therefore amenable to the local jurisdiction; have no claim to precedence; and have no right to approach the local Government except on matters relating to their countrymen as individuals. In certain cases, however, members of the diplomatic service are entrusted with consular functions and are entitled to diplomatic immunities, *infra*, p. 349.

(*f*) *Barbuit's Case*, Forrest, 281; Phill. ii., 329; *Clarke v. Cretico*, 1 Taunt. 106. The same principle is generally recognised in other Courts. See, for example, *Re Lewis Virian Graves*, [1920] Brazil, Annual Digest, 1919-22, Case No. 222; *Re Consul-General of Paraguay*, [1929] Greece, Annual Digest, 1929-30, No. 215, Scott, p. 481; *Bigelow v. Princess Zizianoff*, France, Scott, p. 483.

(*g*) See also *The Indian Chief*, 3 C. Rob. 12; *Coppell v. Hall*, 7 Wall. 542, and *Re Baiz*, 135 U. S. 403.

(*h*) Dicey, Constitution, 188.

The Nature of the Consular Office.—Consuls are agents appointed by a State to watch over its commercial interests, and also to protect the interests of its merchants, its seamen, and its subjects generally, in some foreign place or country. The duties of a consul are for the most part commercial and ministerial, rather than political; he does not represent his State internationally; and he is not, except where expressly invested with diplomatic functions, entitled to the diplomatic character or privileges. He is also commonly appointed to act only for a particular place or district, and for local purposes; although a consul-general often acts for a whole State. Hence he is not usually brought into direct relation with the central Government of the State in which he acts; and communicates either with the local authorities, or with the central Government through them or through the Minister of his own State (*i*). Nevertheless, a consul is in some sort a public agent of his State; he is officially recognised by the local Power; and, although at most points subject to the local civil and criminal jurisdiction, he enjoys certain minor privileges and immunities by custom and comity, whilst more extensive powers and privileges are frequently conferred on him by treaty or convention. Hence a consul comes, to a limited extent, under the protection of the law of nations (*k*).

The Appointment of Consuls.—A consular officer generally acts under a commission issued by the Government which he represents or under its authority; but before acting he must obtain an *exequatur*, or permit, from the Government of the country in which he is to reside. This is sometimes embodied in a formal instrument; but in the case of inferior consular officers a mere endorsement of the commission, or even a notification by the central Government to the authorities of the district in which he is to act, is regarded as sufficient (*l*). This *exequatur* may be refused, if the person appointed is not acceptable to the local Power; whilst it may be withdrawn if the consul is guilty of unfriendly or improper conduct (*m*). Consuls are not affected by political changes; nor do their commissions require to be renewed on a change of Government; or even on a change in the form of government. Nor will the appointment of a consul to act in a country which is subject to a *de facto* Government be regarded as an international recognition of its sovereignty or independence (*n*).

Grades of Consular Authority.—Each State, of course, makes its own provision with respect to the grades and duties of its consular officers. The British consular service comprises: (1) consuls-general; (2) consuls salaried; (3) consuls unsalaried; (4) vice-consuls; and

(*i*) Although a right of direct communication is sometimes conferred by treaty, and is commonly exercised as regards the government of dependencies; Hall, 372 *n*.

(*k*) Taylor, 356.

(*l*) Wharton, Dig. i, § 118.

(*m*) For illustrations, see Hall, 373; and generally, Hall, Foreign Jurisdiction, 72.

(*n*) Hall, 377; Taylor, 359 *n*.

(5) consular agents and proconsuls. Proconsuls are not really consuls, but merely agents who are appointed to perform notarial acts during the absence of a consular officer. Officers of the higher grades are appointed under commissions issued by the Crown; whilst vice-consuls and consuls are appointed by commissioned officers under the authority of the Crown; but neither class may act until recognised by the Government of the country in which they are to reside (o). A consul-general commonly exercises his functions over a wide area, or an entire State; whilst vice-consuls and consular agents generally act in subordination to some higher officer. In other respects these distinctions of grade possess no significance for international purposes. Some States forbid their consuls to engage in trade, and employ only professional consuls. Others allow trading either generally or in particular cases; with the result that consuls are very commonly local merchants, and often not even the subjects of the State they represent. Professional consuls are sometimes invested by treaty with wider powers and more extensive privileges than mercantile consuls (p).

The Functions and Duties of Consuls.—Although it rests with each State to prescribe the functions and duties of its consuls, in so far as these can be lawfully exercised in foreign countries, yet these are for the most part very similar, save in so far as they may be expressly extended by convention. In general, the functions of a consul are: (1) to watch over the commercial interests of his State, to see that commercial treaties are duly observed, and to collect and forward information to its Government on commercial and other matters; (2) to watch over the interests of its subjects within the range of his consulate, to see that the local laws are fairly administered in relation to them, and to render them such advice and assistance as may be proper, having regard to his instructions; (3) to perform certain ministerial and notarial (q) acts, such as the administration of oaths, the legalisation by his seal of local acts and instruments for use in his own country, the receiving of protests and reports from masters of vessels, the authentication of births, deaths, and marriages of subjects, and the administration of the estates of subjects dying intestate within his district; (4) to exercise a voluntary or non-contentious jurisdiction in disputes between the subjects of his State, especially in matters relating to trade, and to exercise also, in cases where this is warranted by local law or by treaty, a disciplinary jurisdiction over the crews of vessels belonging to his State (r). As a rule a consul is empowered to grant passports to subjects of his State, but not to foreigners. These functions,

(o) Phill. ii. 289.

(p) Oppenheim, i. 646.

(q) As to British consular officers, see 52 Vict. c. 10, s. 6, and 54 & 55 Vict. c. 50, s. 2. At the same time, it is perhaps questionable whether the notarial acts of foreign consuls are legal in England; see 41 Geo. 3, c. 79.

(r) On the subject generally, see Hall, 371; Westlake, i. 277.

moreover, are often extended under instructions given him by his own Government; as well as by treaty and convention (s).

The Privileges and Immunities of Consuls.—Although consuls are not entitled to diplomatic immunities, and remain, for the most part, subject to the local civil and criminal jurisdiction, yet the fact of their being officially recognised as the agents of foreign States, and the manifest utility of the consular system in international life, has led to their being invested with certain privileges and immunities not enjoyed by private individuals. These no doubt had their origin in comity and convenience; but with the lapse of time some of the more important privileges of the consular office may be said to have acquired the sanction of general, although not perhaps universal, custom. In practice these privileges are often confirmed, and additional privileges, such as exemption from certain forms of taxation, and even a limited exemption from the local jurisdiction, conferred, by treaty or consular convention (t). Some treaties also concede to consuls the full control over personal property left by their countrymen dying within their consulate. But, apart from convention, a consul is, by virtue of his office, entitled to such reasonable facilities and immunities as may be necessary to the performance of his functions. Nor does it appear unreasonable to claim that, in default of counter-notice, the grant of an *exequatur* entitles him to all such privileges as were enjoyed by his predecessor, and as may be enjoyed by other consuls of the country, except where these rest on special convention (u). More particularly he is entitled to safe-conduct, and special protection in the performance of his duties. An insult or outrage on a consul is commonly regarded as of graver import than one inflicted on a private individual (a). His official papers and archives are exempt from seizure or detention. He is commonly permitted to place the arms of the State he represents, or even to hoist its national flag, over the consulate. He is exempt from such personal obligations accruing under the local law as would seriously impede him in the discharge of his duties; such as service on juries, or in the constabulary, or in the militia. Nor can soldiers be billeted on him. In time of war the consulate of a neutral Power ought to be spared in so far as this consists with military necessity. If a consul is accused of crime, he ought to be released on bail, or kept under surveillance, until his *exequatur* has been withdrawn and other provisions made for the discharge of his duties (b).

(s) As regards the British consular system, see the General Instructions for H.M. Consular Officers; Phill. ii. 289 *et seq.*; and as to the solemnisation of marriages by British consuls, 55 & 56 Vict. c. 23.

(t) Hall, 378 n. As to a consul's jurisdiction over merchant vessels, see p. 310, *supra*.

(u) Halleck, i. 377 (3rd ed.).

(a) Wharton, Dig. i. 783. *Francisco Mallen Claim, United States—Mexico. General Claims Commission, 1927, A. J. I. L. 1927, p. 802, Scott, p. 478.*

(b) Hall, 376; Taylor, 357.

The Civil Status of Consuls.—The civil status of a consul and his relation to the local law will depend on circumstances. If he is a professional consul, having no property in the country, and not engaged in trade there, then he will retain the domicile of his own country, and his civil status will continue to be governed by its law (*c*). If he is a commercial consul and engaged in trade in, but is not a national of, the country in which he acts, then his civil status will be that of a domiciled alien; and to that extent he will be subject to the local law (*d*), save for such exemptions as may attach to him in virtue of his consular office. If he is a national of the State in which he acts, then he will remain subject to all obligations attaching to him by the law of his State, save such as are waived by his recognition as consul (*e*). In both these cases, moreover, he will, in the event of the State in which he resides becoming involved in war, be deemed, from the point of view of the British Courts, to have an enemy character (*f*).

Consuls occupying an Exceptional Position.—Consuls are occasionally invested with diplomatic functions, or accredited not merely as commercial, but also as political or diplomatic agents. In this case they are furnished with the credentials necessary to the diplomatic character; and will then enjoy diplomatic privileges, the office of consul being merged in that of diplomatic agent (*g*). There are also often commercial attachés. Beyond this, consuls representing States of European civilisation in non-Christian countries are also commonly invested by usage or treaty, not only with immunities similar to those enjoyed by diplomatic agents, but also with extensive magisterial and judicial powers. The nature and scope of this consular privilege and jurisdiction have already been described. A foreign jurisdiction in certain British protectorates is also exercised by officers styled consuls-general; but such officers would really seem to have no connection with consuls proper (*h*).

(*c*) *Sharpe v. Crispin*, L. R. 1 P. & D. 611; *Niboyet v. Niboyet*, L. R. 4 P. D. 1.

(*d*) *Supra*, pp. 226, 233.

(*e*) Halleck, i. 403.

(*f*) *Sorensen v. The Queen*, 11 Moo. P. C. 141. As to the practice of other States, see p. 234, *supra*.

(*g*) *Engelke v. Musmann*, [1928] A. C. 433.

(*h*) Jenkyns, *British Rule*, p. 172.

*TREATIES AND OTHER INTERNATIONAL AGREEMENTS***AN ARBITRATION BETWEEN CHILE AND PERU, 1875,
IN THE MATTER OF A TREATY OF 1865**

[British and Foreign State Papers, vol. 56 (1865-66); Moore, *History and Digest of International Arbitrations*, ii. 2085 *et seq.*]

IN 1865 Chile and Peru, being then at war with Spain, entered into a treaty of defensive and offensive alliance with each other. The treaty was originally concluded between the respective plenipotentiaries of the two States, and was signed at Lima on December 5, 1865. It provides, in effect : (1) That the two republics shall form an alliance to repel the aggression of the Spanish Government (Art. 1); (2) That they shall unite the naval forces "which they have, or may hereafter have, available, in order to oppose with them such Spanish naval forces as are or may be found on the waters of the Pacific" (Art. 2); (3) That such naval forces shall obey the Government in whose waters they may be stationed, the supreme command of the united forces being in the senior officer, subject, however, to a right on the part of the two Governments to confer the command of the squadrons, when operating together, on such officer as may be thought most competent (Art. 3); (4) That each of the contracting parties in whose waters the combined naval forces may happen to be shall defray all kinds of expenses necessary for the maintenance of the squadron or of one or more of its ships; but that, on the termination of the war, both republics shall nominate two commissioners, one on each side, "who shall make a definite liquidation of the expenses incurred and duly vouched, and shall charge to each of the republics half of the total amount of those expenses"; and that in such liquidation such expenses as may have been incurred by each of the republics in the maintenance of its squadron or one or more of its ships are to be included (Art. 4); and (5) That the treaty shall be ratified by the Governments of both republics, and the ratifications exchanged within forty days (Art. 6). The treaty was subsequently duly ratified by both Governments; and ratifications were formally exchanged at Lima, and the act of exchange duly attested, on January 14, 1866. After the war had come to an end commissioners were appointed to settle the

basis of the liquidation. On April 8 and 12, 1869, certain agreements with respect to the basis of liquidation were come to; and on September 15, 1870, a partial adjustment of the account was also effected. But disputes having subsequently arisen with respect to the proper basis of the liquidation and other matters incidental thereto, it was agreed, by a protocol signed at Lima on March 2, 1874, to submit the controversy to arbitration; and in the result Mr. Logan, the United States Minister at Santiago, was appointed arbitrator.

The Award.] The award, which was rendered on April 7, 1875, after reciting the terms of the treaty and its ratifications, and the fact that it possessed all the elements and terms of a valid international agreement, proceeds to give a brief summary of the fundamental conditions which, in the opinion of the arbitrator, ought to govern the liquidation of the allied accounts. On the various points in issue between the parties the arbitrator found as follows :

1. As to the precise scope and intention of the treaty, it was held : (a) That inasmuch as the treaty was signed on December 5, 1865, and the ratifications formally exchanged on January 14, 1866, the treaty must be regarded as having become operative from the former date; this on the principle of international law that the exchange of ratifications has a retroactive effect (*i*); (b) That, although certain arrangements—which had been made between the parties as preliminary to or in anticipation of the treaty, relating to the despatch of certain vessels by Peru in the common cause—might fairly be regarded as part thereof, yet inasmuch as all preliminary stipulations must be regarded as merged in the treaty, and governed by its provisions, it could not be held that the vessels so despatched had in fact become available for the common purpose, as required by the treaty, until a much later date; (c) That only such vessels could be regarded as placed at the common expense as were available for united action and as formed part of the allied fleet; and that any expenditure on vessels not so available, but reserved for the individual protection of each country, was not to be regarded as a common expense; this interpretation of the treaty being corroborated by the subsequent acts and communications of the

(i) Wheaton (Keith), i. p. 496.

parties; and (d) That it was intended that the "common expense clause" should apply to vessels which were subsequently added to the combined forces by either party, but that it was not intended that the treaty provisions should apply to vessels engaged in hostile operations elsewhere than in the waters of the Pacific bordering on the coasts of the signatory Powers.

2. As to the particular class of expenses which should be borne by the parties in their separate and in their allied capacity, it was held that all kinds of expenses, apart from those of original equipment which were necessary for keeping the allied vessels in a condition of effective service, including expenditure on pay, supplies, fuel, and ammunition, were expenses intended to be charged against the common account; but that this did not include expenses which were not required for maintenance, or the damage involved in losses sustained in the course of hostilities carried on with the enemy.

3. As to the character and powers of the "commissioners" appointed, it was held that, according to the ordinary meaning of the word, and according to established usage, these "commissioners" were agents appointed for a special purpose, and not diplomatic agents; and that the special duty which they were empowered to carry out was the ascertainment of what sums had properly been spent on the common account, and the charging of each party with one-half of the total amount of expenses. Beyond this they could not go; but within these limits and on these points their findings on the facts were to be considered as final. This view was supported both by the usual practice of nations with respect to the appointment of commissioners for special objects, and also by the fact that no express provision was made by the treaty for the appointment of an umpire, or for submitting their decision for the approval of their Governments.

4. As to the validity of certain agreements, purporting to settle the basis of the liquidation, which had been come to on April 8 and 12, 1869, and the partial adjustment of September 15, 1870, it was held that inasmuch as by a well-established principle of international law a treaty once concluded could only be altered or amended by the same authority and procedure as that by which it had originally been made, the arrangements arrived at between the commissioners with respect to the times at which

the common expenditure on particular classes of vessels should be deemed to have commenced, even though they were arrived at in a spirit of mutual concession, could not, in view of the fact that they were arbitrary arrangements and not sanctioned by the terms of the treaty, be regarded as binding on the parties; and that the partial liquidation of September 15 was therefore only good in so far as it could be shown to conform to the interpretation of the treaty adopted by the arbitrator.

5. As to the period at which the common expenses relating to individual vessels must be regarded as having come to an end, it was held that this period terminated as to particular vessels when they were withdrawn by capture or by entire disability from further service; and as to other vessels remaining under service on October 31, 1867, the date fixed by a convention made between the parties after the withdrawal of the Spanish forces.

6. As regards the division of prize spoils, it was held, on a review of the facts, that there had been only one separate capture which could be said to have enured to the common benefit, and which should be credited to the common account.

7. A number of minor and incidental questions were also determined on general principles of law and equity.

This case, although somewhat complicated in its details, serves to illustrate at once the nature, the forms that attend the making and the interpretation of international agreements which affects the special interests of the contracting parties. It resembles in some measure an agreement for a limited partnership, duly entered into and subsequently brought to an end; in the course of which disputes had arisen as to the scope of the agreement and the adjustment of accounts thereunder. The award, it will be seen, touches on such questions as the nature and the effect of ratification of treaties; the merger of preliminary stipulations in the substantive agreement; the character and powers of special commissioners; as well as certain rules of construction usually applicable to treaties. Amongst these we may notice the rule that (1) words are to be construed primarily in their ordinary sense; (2) in construing a treaty regard must be had to its general tenor; (3) reference may be made to established usage as a guide to interpretation; (4) reference may be made to the subsequent acts and communications of the parties as corroborative evidence of a particular construction of which the words of the treaty were capable; all of which will be referred to more particularly hereafter.

Treaties as a Subject of International Law.—A State may, of course, bind itself by compact with individuals or corporations, but here we are concerned only with compacts between independent States. The extent to which treaties enter into the making of international law, and also their relation to the municipal law both under the British and American constitutions, have already been considered. Most treaties, indeed, deal with matters which relate to the special interests of the parties, and which do not in any way affect the general rules of law. At the same time, the forms of treaties, the general conditions of their validity, and their interpretation and effect, are all questions which are properly the subject of international law, although on many of these matters its rules as we shall see, are both vague and unauthoritative.

Classes of International Agreements.—The distinctions which are commonly drawn between different classes of international compacts do not appear to possess any legal significance (*h*), nor is the nomenclature by any means uniform. In practice however, the term "treaty" is commonly applied to agreements which deal with the larger political or commercial interests of States, the term "convention" to agreements of minor importance or more specific in their objects (*i*), the term "declaration" to announcements of common understandings whilst the term "general Act" is commonly applied to agreements of still wider application, arrived at by some congress or conference of Powers on matters of general international concern. A "protocol" is a document setting forth the conclusions arrived at, or the reservations made, by the parties, at various stages, in the course of some prolonged negotiation or conference. Such an instrument, if signed by the parties, may, it seems, have the effect of annexing the reservations or interpretations which it embodies to the subsequent treaty (*m*).

Conditions of Validity.—The conditions of validity attaching to international agreements are much the same as those which obtain in municipal law, including capacity to contract, reality of consent, legality of object, and a due manifestation of consent, although not necessarily in any particular form. Every Sovereign State is capable of entering into international agreements, but semi-sovereign States, or members of a confederate union, only possess such capacity within the limits of the powers retained by or conceded to them (*n*). In the matter of freedom of consent, however, international law differs from municipal law; for the reason that duress resulting from the pressure which one party is able to bring to bear on the other, either by reason of war or threat of war, will not affect the validity of State compacts, otherwise

(*h*) But as to the distinction between executory and executed conventions, see Taylor, 367, and as to dispositive treaties, Westlake, 1, 283.

(*i*) Hall, 384.

(*m*) Taylor, 393, Westlake, 1, 280.

(*n*) Taylor, 385, but see Hall, 380.

treaties made to end wars would be commonly nugatory (o) But if duress or violence were applied to the person of the agent concerned in the making of such a treaty, this would undoubtedly vitiate it (p) The consent of the parties must also be attested by agents duly authorised, in addition to which most treaties concluded by agents are commonly regarded as subject to ratification by the supreme treaty-making power (q) Finally, it is commonly laid down that such agreements are not to be regarded as binding if they conflict with the fundamental principles of international law or public morality, although some writers, in view of the wide range of disputable topics in either category, would apparently limit this to cases in which the applicability of such principles cannot reasonably be disputed (r) But this statement, although sound in principle, and even unquestionable in some of its more obvious applications, is, in its unqualified form scarcely explicit enough to be serviceable in that class of cases in which the question is most likely to arise, whilst, in its qualified form, it loses most of its significance owing to the wide range of the matters excepted

Forms of International Agreement.—No special form is prescribed for international agreements, which may be either written or verbal At the same time, agreements of any importance are invariably embodied in formal shape, although minor matters are often arranged either by verbal agreements, or by verbal agreements followed by the making of identical municipal regulations, or by declarations signed by the parties, or by correspondence, or by an exchange of diplomatic notes specially directed towards some particular object (s)

The Treaty-making Power in different States.—The question as to where the treaty-making power lies in each State is primarily a question of municipal law, although it possesses also a certain international importance, in so far as a treaty, to be binding on a State must have been made by an authority competent to make it under the municipal law In Great Britain the treaty making power is formally vested in the Sovereign, who, however, acts in the matter on the advice of his Ministers; the actual treaty-making power really resides in the Cabinet, subject to its responsibility to the majority in the Commons (t) At the same time, as has already been pointed out, treaties made by the Crown which derogate from the legal rights of private persons or corporations cannot be given effect to in the United

(o) Taylor, 365, Hall, 381

(p) As to fraud, see Westlake, 1 279.

(q) Taylor, 386

(r) Such as an agreement to assert dominion over the open sea, or to re-establish the slave trade See Phill 1 78; Taylor, 365, Hall, 382 Hall states this rule with greater precision, although the instance first cited by him and the qualification annexed both afford some ground for reflection, having regard to current practice

(s) Taylor, 393, Hall, 383, Westlake, 1 261

(t) Anson, vol II Part II, p 136 (4th ed 1935)

Kingdom unless they have been authorised or ratified by Act of Parliament, or, in the case of the colonies, either by Act of Parliament or by Act of the colonial Legislature (a). In the United States the treaty-making power resides in the President, as head of the federal executive, subject to the approval of two-thirds of the Senate. Once approved, however, such treaties have the effect of a law of the land; although, like other laws, they are subject to the ordinary constitutional limitations, and are liable to be superseded by subsequent Acts of Congress inconsistent with them (a). In France previous to the Second World War the treaty-making power was vested nominally in the President, although really exercised by the Cabinet; but treaties of peace and commerce, and treaties pledging the State finances, or affecting the status of persons and the rights of property of Frenchmen abroad, were binding only after having been voted by the two Chambers (b). Where municipal legislation, dependent on some body other than the treaty-making power in a State, is necessary in order to give effect to a treaty, it is usual to stipulate that the treaty shall not become operative until such auxiliary measures have been duly passed. But where no such condition attaches either expressly or by necessary implication, then it would seem that the State in default may justly be held accountable for the non-fulfilment of its obligations, even though the default is due to the failure of some branch of Government over which the treaty-making power has no control (c).

The Ratification of Treaties.—Where, according to its fundamental laws, the treaties of a State require to be ratified by some body other than that by which they were negotiated, the condition of ratification is necessarily implied. In other cases, the earlier rule appears to have been that ratification was necessary only where there was an express condition to that effect, or where the agent was manifestly acting in excess of his powers. But, except, perhaps, in the case where a treaty has been directly concluded by the supreme treaty-making power, the modern practice would appear to be that all treaties, even though made by agents expressed to be invested with full powers, are nevertheless subject to an implied condition of ratification by the supreme contracting authority. An express condition is in fact generally inserted either in the full power or in the treaty. And this is perhaps justified by the impossibility of duly safeguarding what are often very complicated and important interests, either by the employment of the most competent agents or by the most explicit preliminary instructions. Nor does it appear to be possible to impose any limit on the right of

(a) See *Walker v. Baird*, [1892] A. C. 491; *The Parlement Belge*, 4 P. D. 129; 5 P. D. 197.

(a) Art. II, s. 2, of the Constitution.

(b) Constitutional Law of 1875.

(c) The question of the obligation of the Legislature or other branch of Government in such cases is solely a question of municipal law; all that can be said is that in cases of default the State may be held accountable as for a breach of its compact; see Taylor, 390.

refusing ratification; for the reason that its very object is to secure to a State, not merely a power to guard against the betrayal of its interests or a transgression of authority by its agent, but also an opportunity of considering the entire arrangement in all its bearings, and of its effect as a whole on the interests of the State or of its constitutional law, before binding itself irrevocably. Some writers contend that ratification ought not to be refused except for solid reasons. Ratification is effected by an exchange of instruments embodying the ratification between the supreme treaty-making powers of the respective States. But once a treaty has been duly ratified, then its provisions will, in default of agreement to the contrary, operate, at any rate on the public rights of either party, as from the date of the original signature, although in cases where a treaty requires ratification by the Legislature it will not, apparently, have any retroactive effect on private rights (d).

THE TERMINATION OF TREATIES

CONTROVERSY BETWEEN GREAT BRITAIN AND RUSSIA WITH RESPECT TO THE REPUDIATION BY THE LATTER, IN 1870, OF CERTAIN PROVISIONS OF THE TREATY OF PARIS, 1856

[British and Foreign State Papers, vols. 46 (1855-56); 61 (1870-71); Holland, *European Concert on the Eastern Question*, Texts, p. 241 *et seq.*]

Circumstances out of which the Controversy arose.] IN 1856, on the termination of the Crimean War, an attempt was made by the Great Powers to settle the affairs of South-Eastern Europe "in so far as possible in a permanent manner". With the object of securing Turkey against attack by Russia, the Black Sea was declared to be neutralised, and the maintenance of warships and the establishment of naval and military arsenals on its coasts were forbidden; while to secure Russia against attack by other Powers, in view of these restrictions, Turkey was put under obligation to close the Bosphorus and Dardanelles to all foreign vessels of war, except in the case of hostilities in which Turkey might be engaged. In pursuance of this object, on March 30, 1856, the Treaty of Paris was concluded between Great Britain, France, Austria, Prussia, Sardinia, Russia and Turkey. By this treaty it was provided, *inter alia*: (1) That

(d) *Haver v. Yaker*, 9 Wall. 32; Scott, 530

the Black Sea should be neutralised; its waters and ports being declared open to the mercantile marine of every nation, but interdicted to ships of war both of the riparian States and of all other Powers (Art. 11); saving certain light vessels of war which Turkey and Russia were to be at liberty to maintain for the service of their coasts (e), and two light vessels which each of the Signatory Powers was to be at liberty to station at the mouths of the Danube (Art. 19); and (2) That the Black Sea being thus neutralised, no military or maritime arsenals should be established or maintained on the coasts by either Russia or Turkey (Art. 13). By a convention of the same date which was annexed to the treaty, and made between the same parties, it was provided that Turkey should maintain, and that the other Powers should respect, the ancient rule of the Ottoman Empire prohibiting ships of war from entering the Dardanelles and the Bosphorus so long as the Porte was at peace (Art. 1); subject, however, to a right on the part of the Porte to permit the entry of certain light vessels of war in the service of the missions of foreign Powers, as well as the vessels referred to in Art. 19 of the treaty (Arts. 2 and 3).

The Controversy.] In 1870, during the war between France and Germany, two of the principal parties to the original treaty, the Russian Government addressed a circular to the Powers declaring itself to be no longer bound by those provisions of the Treaty of Paris which had reference to the Black Sea. In justification of this proceeding, it was stated generally that "the treaty had not escaped the modification to which most European transactions had been exposed, and that in the face of such changes it would be difficult to maintain that the written law founded on respect for treaties as the basis of public right retained that moral validity which it may have possessed at other times". More particularly it was alleged: (1) That the neutralisation of the Black Sea as contemplated by the treaty had, owing to the changes in naval warfare incident to the use of ironclads, become altogether illusory, for the reason that, whilst Russia was disarmed, Turkey retained the right of maintaining unlimited naval forces in the archipelago and straits, whilst France and England retained their power of concentrating

(e) Art 14. A convention of the same date and to the same effect was also entered into between Russia and Turkey and incorporated in the treaty.

squadrons in the Mediterranean, thus rendering Russia liable to sudden attack from enemies forcing a passage of the straits; (2) That the efficacy of the treaty had been impaired by the acquiescence of the Powers in certain revolutionary changes, such as the union of Moldavia and Wallachia, which were at variance both with the letter and spirit of the treaty; and (3) That under various pretexts foreign men-o'-war had been repeatedly suffered to enter the straits, and that whole squadrons, whose presence was an infraction of the character of absolute neutrality attributed to those waters, had been admitted to the Black Sea. Great Britain, in replying to the Russian circular, took the broad ground that no party to a treaty could be relieved from its obligations except with the consent of the other parties thereto; apparently taking it for granted that no such breach had occurred as would operate as a release. "The despatches of the Russian Government", it was said, "appear to assume that any one of the Powers who have signed the engagement may allege that occurrences have taken place which, in its opinion, are at variance with the provisions of the treaty, and, though their view is not shared or admitted by the co-signatory Powers, may found upon that allegation, not a request for a consideration of the case, but an announcement that it has emancipated itself, or holds itself emancipated, from any stipulations of the treaty of which it thinks fit to disapprove. Yet it is quite evident that the effect of such a doctrine, and of any proceeding which, with or without avowal, is founded on it, is to bring the entire authority and efficacy of treaties under the discretionary control of each of the Powers who may have signed them; the result of which would be the entire destruction of treaties in their essence." The other Powers also refused to admit the Russian contention. In these circumstances Russia deemed it politic formally to abandon the position she had taken up, subject to an understanding that a conference would be summoned to deal with the question.

The Settlement, and the Protocol to the Treaty of London, 1871.] A conference of such of the signatory Powers as could attend was accordingly summoned, and met in London in 1871. At the instance of Great Britain it was declared: "That the Powers recognise it as an essential principle of the law of nations that no Power can liberate itself from the engagements of a

treaty or modify the stipulations thereof, unless with the consent of the contracting parties by means of an amicable understanding". This principle was embodied in a protocol which was thereupon signed by the plenipotentiaries, that is to say, by North Germany, Austria, Great Britain, Italy, Russia and Turkey; and which was subsequently also adopted by France (f). Subject to this declaration, an arrangement was come to between the parties for the revision of certain stipulations of the Treaty of Paris of 1856, and the abrogation of the attendant convention. By the Treaty of London, 1871, it was accordingly provided, in effect, that Articles 11, 13 and 14 of the Treaty of Paris, of March 30, 1856, as well as the special convention concluded between Russia and Turkey, and annexed to Article 14, should be abrogated and replaced by the following provisions: (1) "That the principle of the closing of the Dardanelles and Bosphorus as established by the separate convention of 1856 should be maintained; but with power to the Sultan to open the straits in time of peace to the vessels of war of friendly and allied Powers in case the Porte should judge it necessary in order to secure the execution of the stipulations of the Treaty of Paris"; and (2) That the Black Sea should remain open as heretofore to the mercantile marine of all nations (g).

The principle enunciated, in 1871, as an essential principle of the law of nations—that "no Power can liberate itself from the engagements of a treaty, or modify the stipulations thereof, unless with the assent of the contracting Powers, by means of an amicable arrangement"—has been denounced, on the one hand, as too elementary to need any formal declaration; and, on the other hand, as well-meaning, but impracticable. It is conceived that it must be read in the light of the peculiar circumstances which led to its enunciation (h); and that it really amounts to a declaration that a treaty cannot be annulled by one of the parties thereto, without the consent of the other or others, in circumstances such as there existed—in circumstances, that is, which involve no change in the fundamental conditions on which the treaty was based, and which show no violation of the treaty by the other parties in any vital or material part. Viewed in this light, the rule may probably be regarded as the primary rule from which the law of

(f) B. and F. S. P. vol. 61, p. 1198.

(g) See Arts. 2 and 3; and as to the new provisions with respect to the navigation of the Danube, Arts. 4-7; B. and F. S. P., vol. 61, p. 7.

(h) On the doctrine of *rebus sic stantibus* see Oppenheim, i. 738.

nations on this subject starts (i). The action of Austria-Hungary in 1908 in regard to Bosnia Herzegovina was in many respects similar to the Russian conduct in 1870 and formed a not unimportant link in the chain of circumstances leading to the First World War. Unilateral repudiation of treaties marked also the course of Nazi Germany towards the Second World War.

How Treaties may come to an End.—Treaties are of different kinds and are terminable in different ways. (1) Some treaties impose no continuing obligations, and once executed cease to have any further effect. This is also the case with treaties which define or transfer rights *in rem*, such as treaties ceding territory, or defining boundaries, or creating servitudes; for in all these matters treaties supply, as between States, the place of conveyances between individuals, and once the rights conferred have duly passed they no longer depend on treaty, but on the general law (i). (2) Other treaties carry their own provisions with respect to termination; as where they are made for a specified and limited purpose, or for a specified time, or are expressly made terminable by notice, or are mutually understood to be at the will of either party. (3) Other treaties, again, have no limit assigned to their operation, whether expressly or impliedly, and it is as to these that the difficulty for the most part arises. Treaties or declarations purporting to define legal rules, such as the Declaration of Paris, 1856, are supposed, unless expressly limited, to be perpetual; although in fact capable of being rescinded or modified by common assent, or by some new international act or declaration (k). Some treaties are put an end to by war, whilst others are only suspended (l). All treaties, moreover, may come to an end by mutual agreement of the parties; or by becoming impossible of fulfilment, although in this case it would seem only to the extent of such impossibility (m); or by becoming incompatible with the fundamental principles of law or with the general obligations of States, although seemingly only to the extent of such incompatibility (n). A treaty will also cease to be binding when one of the contracting Powers loses its independent existence, as when it is compulsorily or voluntarily absorbed into another State; subject, however, as regards certain kinds of obligations, such as those involving a money liability, to such claims against the absorbing State as may be warranted by the principles of State succession. But where the sovereignty and independence of one of the contracting States are not wholly extinguished, as where it becomes a member of a union of States, then the treaty will be affected only in so far as the fulfilment of its stipulations has become incompatible with the new relation (o).

(i) Hall, p. 404.

(k) The Declaration of Paris, 1856, contains no provision for denunciation.

(l) Vol. ii, "Effect of War on Treaties"; and Hall, 456-8.

(m) Hall, 405.

(n) Treaties originally incompatible with established principles or established rights will be void *ab initio*.

(o) Hall, 415; and *Terlinden v. Ames*, 184 U. S. 270.

The Right to annul a Treaty.—The right of one signatory Power to abrogate or annul the provisions of a treaty, without the consent of the other parties thereto, would seem to depend on the following considerations: (1) It is clearly an implied condition of every treaty that it shall be observed in all material points by the contracting Powers; and if one Power wilfully neglects or refuses to fulfil this obligation, then such neglect or refusal will confer on the other, either a right to resort to those measures of redress which attend the commission of an international wrong, or a right to annul the treaty and to regard itself as free from any further obligation in the matter. But to warrant this it would seem, on principle at least, that the breach must be such as to effect one of the main objects of the treaty, or such as to deprive the other contracting Power of some advantage which constituted a material inducement to the making of the treaty (*p*). (2) Having regard to the continuity of State life, moreover, it seems impossible to maintain that a treaty, even though on its face it purports to be of indefinite duration, continues binding for all time, and notwithstanding any change of conditions, however vital, unless discharged or modified by mutual consent. Both the changing conditions of national life, and the reason of the thing, therefore appear to suggest that it is an implied condition of a treaty, even though it purports to be indefinite, that it shall be regarded as terminable by any material change in the fundamental conditions which obtained at the time at which it was entered into. In many of the older treaties there was inserted the *clausula rebus sic stantibus*; by virtue of which the treaty might be construed as abrogated when the material circumstances on which it rested changed (*q*). The permanent Court has not so far had opportunity to declare itself on this question, for in the matter (*r*) of the denunciation by China of the treaty with Belgium of November 2, 1865, a *modus vivendi* was found, while in the case of the *Free Zones of Upper Savoy and Gez* (*s*), the Court was able to point to a subsequent agreement.

Where the change in circumstances has been so great as clearly to remove one of the implied conditions under which the treaty was concluded, it is not probable that it would be impossible to obtain revision by mutual agreement. States are not so unreasonable as to insist on the observance of wholly obsolete provisions. Where the difficulty occurs is in border-line cases, in which the onus of proof of essential change should be on the State alleging it; or in cases where the doctrine of *rebus sic stantibus* is invoked merely as a cloak to excuse a State which has taken the law into its own hands, and repudiated its international obligations. International practice and the opinion of the majority of

(*p*) Hall, 409.

(*q*) *Hooper v. U. S.*, 22 Court of Claims, 408; Scott, at p. 582.

(*r*) P. C. I. J., Series A, Nos. 8, 14, 16, 18, 19.

(*s*) P. C. I. J., Series A, No. 22.

jurists alike give no certain guidance on this question, and, while acknowledging the fundamental nature of the rule, *Pacta sunt servanda*, admit that a fundamental change of circumstances may under certain conditions justify a signatory in declaring the provisions of a treaty to be obsolete.

THE INTERPRETATION OF TREATIES

WHITNEY v. ROBERTSON

(1888) 124 U. S. 190; Scott and Jaeger, p. 568.

THIS was an action brought by the plaintiff, a merchant of New York, to recover a sum of \$21,936, paid by him, under protest, to the defendant, the Collector of Customs of the port of New York, as duty on a large quantity of sugar which had been imported by the plaintiff from San Domingo, and which the plaintiff claimed was exempt from duty by virtue of the provisions of a treaty existing between the United States and the Dominican Republic. By Article 9 of this treaty it had been agreed that "no higher or other duty shall be imposed on the importation into the United States of any article, the growth, produce or manufacture of the Dominican Republic, and no higher or other duty shall be imposed on the importation into the Dominican Republic of any article, the growth, produce or manufacture of the United States, than are or shall be payable on the like articles, the growth, produce or manufacture of any other countries". Meanwhile, by another treaty subsisting between the United States and the King of the Hawaiian Islands, provision had been made for the importation into the United States, free of duty, of various articles, the produce and manufacture of those islands, in consideration, among other things, of a like exemption from duty on the importation into those islands of sundry specified articles, the produce and manufacture of the United States; this reciprocal engagement being recited to be in consideration of the rights and privileges, and as an equivalent therefor, conceded by one party to the other. On these facts it was contended by the plaintiff that, inasmuch as sugar from the Hawaiian Islands was admitted free of duty,

sugar imported from San Domingo must, on a proper construction of the treaty, be entitled to a like exemption. The defendant demurred to the complaint; and the demurrer having been upheld, judgment was entered for the defendant. The matter was thereupon carried on appeal to the Supreme Court, by which the judgment of the Court below in favour of the defendant was finally affirmed.

Judgment.] Mr. Justice Field, in delivering the judgment of the Supreme Court, after adverting to the facts, pointed out that in the case of *Bartram v. Robertson*, 122 U. S. 116, the Court had had to decide a question arising on a somewhat similar claim under a treaty made with Denmark. In that case the Court had come to the conclusion that the true intention of the contracting parties was, that in the imposition of duties by either party there should be no hostile discrimination against the other, but that it was not intended to interfere with any special arrangements that might be made with other countries, founded on the concession of special privileges. In the present case the terms of the treaty with the Dominican Republic were, in spite of some minor differences, substantially the same; and here, too, it seemed to the Court that Article 9 was intended as a pledge of the contracting parties that there should be no discriminating legislation against the importation of articles which were the growth, produce or manufacture of the respective countries, in favour of articles of like character imported from any other country; but that it was never designed to prevent special concessions, upon sufficient consideration, touching the importation of specific articles. Indeed, it would require the clearest language to warrant the conclusion that the Government of the United States intended to preclude itself from such engagements with other countries, which might in the future be of the highest importance to its interests.

But, apart from this consideration, there was another answer to the plaintiff's pretension, in that the Act of Congress authorising these duties was passed after the treaty with the Dominican Republic had been concluded, and if there was any conflict between the stipulations of the treaty and the requirements of law the latter must prevail. A treaty was primarily a contract between two independent nations. For any infraction of these provisions a remedy must be sought by the injured party

through reclamations upon the other. If the stipulations of a treaty were not self-executing, and could only be enforced pursuant to legislation to carry them into effect, then such legislation was as much subject to repeal or modification by Congress as legislation on any other subject. If its stipulations were self-executing, and required no legislation to make them operative, then (under the Constitution of the United States) they had the force of a legislative enactment. But even then it was open to Congress to modify or supersede them by subsequent legislation. In such a case, although the Courts would try to construe the instruments in such a way as to give effect to both, yet, if they were inconsistent, the last one in date would prevail, provided that the stipulations of the treaty were self-executing. If the other party to the treaty were dissatisfied with the action of the legislative department, it could make its complaint to the executive head of the Government; but the Courts could give no redress, for such a matter was not one for judicial cognisance : *Taylor v. Morton*, 2 Curtis 454. If the law was clear, it could not be assailed in the Courts for want of conformity to the stipulations of a previous treaty not already executed : *Head Money Cases*, 112 U. S. 580.

The judgment in this case embodies a decision on two distinct questions, one of which relates to the interpretation of treaties generally, and in particular to the interpretation of a clause frequently found in commercial treaties known as the "most favoured nation clause"; whilst the other relates to the place occupied by treaties under the law and Constitution of the United States. The case also affords a convenient illustration of the conditions under which treaties may occasionally present themselves as subjects for judicial interpretation in municipal Courts. On the question of the interpretation of treaties, it seems that both international tribunals and municipal Courts will, in construing international compacts, adopt a more liberal construction than that which would ordinarily be applied, at any rate in the English and American Courts, to the construction of private instruments and agreements. So in *Whitney v. Robertson* it will be seen that the intention of the parties to the treaty was considered in the light both of the practice ordinarily followed in the framing of commercial treaties, and the effect which a particular construction would have had on the national interests (f). Looked at in this light, it was held that the

(f) See Westlake, i. 283.

clause in the San Domingo treaty which stipulated, in effect, that no higher duties should be imposed on the imports from that State than were imposed on the imports from other States—with a similar stipulation, in favour of the United States, as regards San Domingo—was to be construed, not in its strict and literal sense, but merely as a pledge by each party that there should be no discrimination against the goods of the other, in favour of the goods of other States; and that such a stipulation did not, therefore, apply in a case where the imports of some other State were admitted on specially favourable terms in return for special concessions. And this interpretation of the “most favoured nation clause” appears to be at once correct in principle and generally accepted in practice.

COOK v. UNITED STATES (THE “MAZEL TOV”)

288 U. S. 102; A. J. I. L. 1933, p. 559; Annual Digest, 1931-2, Case No. 1; Scott and Jaeger, p. 533.

FOR the prevention of the importation of intoxicating liquors into the United States, the U.S. Tariff Act of 1922 provided that the U.S. authorities might board and seize any vessel bound for the U.S. in violation of the prohibition laws within a distance of four leagues from the shore. The British Government having objected to this jurisdiction, by treaty between the two countries of May 22, 1924, the three-mile limit was asserted as the proper limit of territorial waters, but provision was made allowing the boarding and examination of British ships suspected of smuggling in liquor if found within one hour's sailing distance of the coast. The provisions of the Tariff Act of 1922 were re-enacted in the Tariff Act of 1930.

On November 1, 1930, the British vessel “Mazel Tov” was boarded by U.S. coastguards eleven and a-half miles off the coast of Massachusetts and taken in tow to the port of Providence. The Customs authorities assessed a penalty for an offence against the Tariff Act, and brought an action *in rem* to enforce its collection. It was admitted that the speed of the “Mazel Tov” did not exceed ten knots an hour. The place of seizure was, therefore, more than three miles, and not within one hour's run from the shore. The Supreme Court held that the ship must be released. The Tariff Act of 1930 was a mere

re-enactment of that of 1922, which had been superseded by the treaty in so far as the two were inconsistent. The treaty would not be deemed to have been abrogated or modified by a later statute unless such purpose had been clearly expressed.

The Court in this case followed the principles laid down in *Whitney v. Robertson*, *supra*, p. 363, and held that the statute of 1930, though later in time than the treaty, being a mere re-enactment of a statute which in 1924 had become subject to the treaty, must be regarded as still to be interpreted as controlled by the treaty provisions. The Court recognised that there is a presumption that a State intends to respect its international obligations. As to the relation between municipal legislation in England and the United States, see pp. 12-21, *supra*.

The Language of Treaties.—Up to the middle of the eighteenth century treaties were ordinarily expressed in Latin; but subsequently French appears to have taken its place. So, the Treaty of Vienna of 1815 is in French, although each Power reserved the right in future conventions of adopting such language as it might think fit. Later, the custom arose of writing treaties in the language of each of the contracting parties: although the difficulty of interpreting texts in two languages, both of which are binding, occasionally led to the adoption of a French version for common reference. But the conventions under which the "international unions" have been constituted are entirely in French; and the same applies to the various conventions framed by The Hague Conferences. In the Peace Treaties following the war of 1914-19, however, the French and English versions are of equal authority.

Interpretation of a Treaty in Two Languages.—In the *Mavrommatis Case* the Permanent Court laid down (*n*) that "where two versions possessing equal authority exist, one of which appears to have a wider bearing than the other, the more limited interpretation must be adopted which can be made to harmonise with both versions and which as far as it goes is in accordance with the intention of the parties".

Some General Rules of Interpretation.—The Permanent Court was busy since its inception, in hammering out rules for the interpretation of treaties which will have the effect of eventually rendering this happy hunting ground of the more speculative sort of text-book writer more or less uninhabitable.

First and foremost the Court has definitely rejected what has been called the continental notion that *travaux préparatoires* can be referred to. It has laid down:

"(1) That, where the meaning of the text of a treaty is clear on the face of it, the records of the preparatory work of the conference at which the treaty has been drawn up cannot be invoked for the purpose of putting upon it a different meaning, and there is no reason to look at them (a);

"(2) That the minutes of the preparatory work of a treaty cannot be used to determine its meaning, and are not admissible in evidence against a party to the treaty which did not take part in the preparatory work, and the fact that they have been published does not render them admissible" (b).

In the *Danzig Postal Services Case* the Court said (c): "It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd".

In the *Wimbledon Case* the Court laid down (d): "That provisions in a treaty imposing on a State limitations on the exercise of its sovereign rights, should, in case of doubt, be interpreted narrowly" (but added that the conclusion of such a treaty is not an abandonment of sovereignty, the right of entering into international engagements being an attribute of sovereignty).

The rule *generalia specialibus non derogant* was recognised in the *Case of the Serbian Bonds* (e), as also the rule that, in construing a contract, meaning must be given to all its terms.

In the *Brazilian Loans Case* it was affirmed (f) that where documents are ambiguous they should be construed *contra proferentem*.

Conflict of Treaties.—In cases where two treaties conflict, the rules commonly laid down are as follows: (1) Where the conflict is between two treaties made between the same Powers, at different times, then that which was last entered into will be preferred, it being presumed to have been made in substitution for the earlier; save, perhaps, in cases when the latter was made by inferior authority (g). (2) Where the conflict is between two treaties made at different times between different States, then it is said that the earlier will prevail, for the reason that it is not permissible to derogate from an earlier engagement made with one State by a subsequent engagement made with another, without the former's assent (h).

(a) P. C. I. J., Series A, No. 19, at p. 16, the *Lotus Case*; Series B, No. 14, pp. 28 and 31. European Commission of the Danube; Series B, No. 12, p. 22, Art. 3 (2) of the Treaty of Lausanne; Series B, Nos. 2-3, p. 41. Competence of the International Labour Organisation; Series A, Nos. 20-21, p. 30, Serbian Bonds.

(b) *Ibid.*, Series A, No. 23, p. 42, International Commission of the Oder.

(c) *Ibid.*, Series B, No. 11, p. 39.

(d) *Supra*, 166, cf. *Oder Case*, P. C. I. J., Series A, No. 23, at p. 26.

(e) P. C. I. J., Series A, No. 20, at p. 30.

(f) *Ibid.*, Series A, No. 21, at p. 114.

(g) Hall, 396; Taylor, 399.

(h) A list of English and American decisions which touch on the question of interpretation of treaties will be found in Phill. ii. 130 n; and Halleck, i. 318.

*INTERNATIONAL DELINQUENCIES AND METHODS OF
REDDRESS SHORT OF WAR*

THE CASE OF THE SILESIAN LOAN

[1752: De Martens, *Causes Célèbres*, n. 97; Satow, *The Silesian Loan and Frederick the Great*, 1915.]

IN 1744 war broke out between Great Britain, on the one hand, and France and Spain on the other. Towards the end of 1745 certain Prussian subjects commenced to load cargoes of merchandise on French account; whereupon several Prussian vessels laden with French goods were captured by British cruisers, and their cargoes condemned on the ground that they were enemy property or property embarked in the enemy trade. By the end of 1748 some eighteen Prussian vessels, as well as thirty-three other neutral vessels, chartered in whole or part by Prussian subjects, had been thus captured and brought in for adjudication on similar grounds. In effecting these seizures Great Britain followed her usual maritime practice, which was based on the principles (1) that neutral property found on enemy ships, not being contraband, was exempt from capture; (2) that property belonging to the enemy or embarked in the enemy trade, found on neutral vessels, was liable to capture; and (3) that property having a contraband character was liable wherever found. By way of reprisal the King of Prussia thereupon confiscated certain funds which had been hypothecated to British subjects in consideration of a loan of money which had been made by them on the security of the revenues of Silesia; a debt which he had bound himself to repay by certain treaties entered into in 1742.

Controversy.] In substance the two main questions in issue between the parties were: (1) as to the legality of the proceedings adopted by Great Britain with respect to the capture of the Prussian vessels and their cargoes; and (2) as to the legality of the proceedings adopted by Prussia in confiscating debts due to British subjects, by way of reprisal and indemnity. On these points the Prussian contention was, shortly: (1) That neither by the laws of nature nor by the law of nations had Great Britain any jurisdiction over property found in neutral vessels on the high seas, except in the case of contraband, whereas the goods in the present case were not of that character; and (2) That, in

view of such captures having been illegal, the King of Prussia was entitled to utilise funds under his control, not so much by way of reprisal as by way of compensation, even though such funds might have been hypothecated to British subjects. In Great Britain these questions were referred for report to the Law Officers of the Crown, Sir George Lee, Dean of Arches; Dr. G. Paul, Advocate-General; the Attorney-General, and the Solicitor-General (William Murray, afterwards Lord Mansfield, L.C.J.), who advised, in effect: (1) That, according to the recognised principles of international law, the British seizures were justifiable, on the grounds (a) that property belonging to the enemy was liable to seizure, even though found on neutral vessels, and (b) that contraband was also liable to seizure, even though belonging to neutrals; and (2) That the law of nations permitted reprisals in two cases only: (a) in cases of violent wrong directed and supported by the sovereign authority, and (b) in cases of a denial of justice by all tribunals and by the sovereign authority itself in matters not admitting of doubt. It was further pointed out that the practice of reprisals would not warrant the seizure of debts owing to private individuals; especially in a case where the Sovereign effecting such seizure had bound himself in honour to pay such debts, and in a case where, at the time of the seizure, the payment of the debt had already accrued due.

Settlement.] After much further discussion and negotiation the matter was finally settled by the Treaty of Westminster, 1756, whereby, in consideration of Prussia agreeing to pay off the loan according to the original contract, Great Britain undertook to pay a sum of £20,000 to Prussia in discharge of all claims (i).

The controversy in this case turned largely on the question of the liability of enemy property, not being contraband, found on neutral vessels. At the time of the dispute two rival principles prevailed with respect to the liability of property to maritime capture in time of war. According to one, which was generally followed by Great Britain, the liability of the property was determined by the nationality of its owner; with the result that enemy goods found on neutral vessels were liable, whilst neutral goods, not being contraband, found on enemy

(i) See also Phillimore, iii. 33.

vessels went free. According to the other, which was generally followed by other European nations, the liability of the property was determined by the nationality of the vessel, with the result that enemy goods on neutral vessels went free, whilst neutral goods on enemy vessels, unless exempted by treaty, were held liable. This matter, however, is now regulated as between nearly all civilised States by the Declaration of Paris, 1856, the effect of which, in relation to the earlier law, will be considered later (*k*). The case is therefore cited mainly as illustrating an application, although in the circumstances seemingly an improper application of a mode of redress falling short of war, known as "reprisals". This method of redress once filled an important place in all treatises on the law of nations (*l*), and even now claims some notice although it has greatly decreased in importance. Reprisals are strictly acts of retaliation, and may be either "hostile reprisals", which belong to the subject of war (*m*), or "pacific reprisals". The latter are acts of retaliation which are unfriendly in their nature, but which are not in themselves intended to set up a state of war. Such reprisals are sometimes classed as "general" or "special". But of these, "general reprisals" (*n*) appear to involve the adoption of actual measures of hostility both against the offending State and its subjects and to constitute really a preliminary to or concomitant of war. So, on the outbreak of war between Great Britain and Russia, in 1854, an Order in Council was issued authorising "general reprisals against the ships, vessels, and goods of the Emperor of All the Russias, his subjects, and other inhabitants of his dominions" (*o*). "Special reprisals", on the other hand, are acts of retaliation, limited in their nature or scope, resorted to by one State in order to extort satisfaction for some injury to itself or its subjects, for which justice has been denied or unreasonably delayed, but without embarking in open war. There was formerly a distinction between "public reprisals", in virtue of which an aggrieved State issued letters of marque and reprisal to its armed forces or agents, and "private reprisals", in virtue of which it issued letters of reprisal to particular individuals who had suffered injury at the hands of some other State or its subjects. But the practice of issuing letters of reprisal to private individuals has now been abandoned, and reprisals in so far as they are still resorted to are now carried out only by the State or its agents. With this, much of the earlier learning on the subject of reprisals has fallen into desuetude. Measures of reprisal may be either "positive" or "negative" in their character. "Positive reprisals" consist in the

(*k*) *Infra*, vol. II.

(*l*) Vol. II.

(*m*) See Maine, 203.

(*n*) This term is, however, sometimes identified with public reprisals, see Hall, 437 n.

(*o*) See Phillimore, in 20.

seizure of any property belonging either to the offending State or its subjects. So, in 1834, President Jackson, in recommending to Congress the adoption of reprisals against France, urged that it was 'a well settled principle of international law that when one State owes another a liquidated debt which it refuses or neglects to pay, the aggrieved party may seize property belonging to the delinquent State or its subjects, sufficient to pay the debt, without giving just cause of war' (p). But the seizure by way of reprisal of the property of private individuals other than commercial property (q) would now probably be reprobated. "Negative reprisals", on the other hand, consist in the refusal to discharge some admitted obligation owing to the offending State, whether under treaty or otherwise. Of this form of reprisals the action of the King of Prussia in the case of the Silesian loan affords an example, although the reprisals, in this particular case, were by general assent, regarded as unjustifiable (r). At the present time reprisals, in so far as they are still resorted to, are usually applied to minor Powers, and generally take the form of a temporary occupation of a port or some part of the territory of the offending State or a seizure of customs duties, or the imposition of an embargo on vessels, or the institution of a pacific blockade. So, amongst recent instances, Great Britain, in 1895 seized the port of Corinto and levied the customs duties there, until Nicaragua agreed to make reparation for injuries inflicted on British subjects. France, in 1901, seized a port in the island of Mytilene, until Turkey agreed to satisfy certain contractual claims on the part of French citizens. The Netherlands, in 1908, blockaded the ports of Venezuela and seized two gunboats by way of reprisal for illegal interference with her trade and the expulsion of her Minister. Other forms of procedure by way of reprisal will be considered hereafter. Reprisals, whether of this or the earlier kind, if they do not lead to war, have the advantage of being limited in their operation, of not involving any general disturbance of trade or treaties and also of not affecting private interests outside the immediate scene of the operations (s). Somewhat different in their object are those summary measures, such as the shelling of a village or the bombardment of a town, which are occasionally resorted to by civilised States for the purpose of punishing or preventing the continuance of outrages or wrongs committed against their subjects by members of uncivilised communities (t).

(p) Phillimore, iii 41

(q) And even this is not usually confiscated, at any rate in cases of embargo or pacific blockade

(r) Phillimore, iii 34, n (e)

(s) These differences are well stated in *Gray v U S*, 21 Court of Claims, 340

(t) See Wharton, Dig 1 229 and ii 595, and on the subject of reprisals generally Hall 433 Taylor, 435, Westlake, L Q R, April, 1909

THE "BOEDES LUST"

(1804) 5 C. Rob. 233.

IN 1803 various disputes arose between Great Britain and Holland, with the result that on May 16 in that year an embargo was imposed on all Dutch property found in British ports. By virtue of this embargo, the "Boedes Lust", a Dutch vessel, was seized on May 19. In the following month war actually broke out between the two countries. On the captors proceeding to adjudication, the property was claimed on behalf of certain persons resident in Demerara, on the ground that they were not, either at the time of the seizure or at the time of the adjudication, in the position of enemies of Great Britain. It appeared that at the time of the seizure Demerara was a Dutch settlement; but it was urged on behalf of the claimants that even if this were so, yet, inasmuch as the property had been seized before any actual declaration of war, it could not be regarded as enemy property. It was also urged that inasmuch as in the course of the war Demerara had passed under British control, the property could not be deemed enemy property at the time of adjudication. Notwithstanding these contentions, a decree of condemnation was pronounced by the Court.

Judgment.] Sir William Scott, in giving judgment, stated, in effect, that a seizure under an "embargo" was at first equivocal. If the matter in dispute had been settled, the seizure would have been converted into a mere civil embargo (*u*), and the property would have been restored. But if, as actually happened in the present case, hostilities ensued, then the outbreak of war had a retroactive effect and rendered all property previously seized liable as enemy property seized under a measure hostile *ab initio*. Such property was then liable to be used as the property of persons guilty of injuries which they had refused to redress by any amicable alteration of their measures. As to the second contention, he must hold that the property at the time of the capture belonged to subjects of the Batavian Republic, and that the subsequent acquisition of Demerara by Great Britain would not preclude the consequence of their original hostile character.

(*u*) "Civil" only in the sense of not involving a confiscation of the property.

An embargo consists in the provisional seizure or detention by a State of ships or property—generally, although not invariably—in its own ports. A civil embargo is not an international proceeding, and usually applies only to vessels of the State that imposes it; having for its object the protection of commerce or other interests (a). A hostile embargo, on the other hand, consists in the provisional arrest by one State of ships or goods belonging to the subjects of another State, against which there is some cause of complaint; this either as a means of extorting redress short of war, or as a measure anticipatory of war. But in neither character does it now possess much importance. As a measure anticipatory of war it has now been virtually abandoned, in deference to a usage which has recently developed, and which was embodied in the “Convention relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities”, framed by The Hague Conference, 1907 (b). By virtue of this modern custom a belligerent not only waives his right of seizure in anticipation of war, but even concedes to enemy vessels which are, at the time of the outbreak of war, either in or on their way to his ports, liberty to depart or to enter and depart, as the case may be, together with a further immunity from seizure on the return voyage to their own country (c); although these provisions do not apply to merchant ships whose build shows that they are intended for conversion into warships (Art. 5), as to which the earlier right of seizure remains; but if the other belligerent refuses to accord reciprocity, the old right of seizure is revived (*The Marie Leonhardt*, [1921] P. 1). Britain in 1925 exercised her right to withdraw her adhesion to this Hague Convention. It does not seem probable that in wars of a major character today, the practice of granting permission to enemy ships to depart will ever again be the general rule. On the other hand, it probably remains true that the anticipatory embargo is virtually obsolete. As a measure of redress short of war a hostile embargo might, indeed, still be resorted to; and in such a case the right of confiscation would seemingly still attach, if satisfaction were refused or if the embargo led to war. But such a measure would now scarcely be applied to vessels belonging to a major Power; whilst, as regards minor Powers, this form of embargo has been for the most part superseded by an embargo of a more efficient kind, which consists in the detention of the vessels of the offending State in its own ports, in which character it really appears to be an incident of “pacific blockade” (d).

(a) As to civil embargo in English law, see Phillimore, iii. 44.

(b) Arts. 1 to 4; Whittuck, p. 152.

(c) As to the application of this rule, see *The Buena Ventura*, 175 U. S. 384; and *infra*, vol. ii.

(d) As to the relation between the two, see p. 381, *infra*; and on the subject of embargo generally, Hall, 435; Taylor, 432.

**AN ARBITRATION HELD IN 1903 BETWEEN GREAT
BRITAIN, GERMANY, AND ITALY, AND VENEZUELA,
WITH OTHER POWERS INTERVENING**

[Parl. Papers, 1902-4: British and Foreign State Papers, vols. 95, 96 (1901-2, 1902-3); Scott's Hague Reports, p. 55.]

Events leading to Arbitration.] For some time prior to 1902 the conduct of the Government of Venezuela and the action of the Venezuelan authorities towards foreign residents and in relation to foreign interests had provoked much dissatisfaction on the part of other Powers. Great Britain, in particular, had addressed a number of complaints to the Venezuelan Government with reference to the seizure of British vessels, interferences with the person and property of British subjects, and the occasional violation of British territory. Germany also alleged certain grievances arising out of injuries sustained by German subjects during the civil wars of 1898 and 1900. Other Powers had reason to complain of the non-fulfilment of contractual obligations incurred by the Venezuelan Government toward their subjects. All attempts to obtain satisfaction having proved ineffectual, in December, 1902, the Governments of Great Britain and Germany, and, at a somewhat later stage, the Government of Italy, agreed to adopt joint measures of reprisal against Venezuela for the purpose of enforcing a settlement of these claims. In pursuance of this arrangement, the Venezuelan warships were seized by the British and German squadrons, several of them being sunk in the process. In consequence of a further outrage on a British vessel at Puerto Caballo, certain adjacent forts were also attacked, and one of them demolished. A blockade of the Venezuelan ports was also decided on. Great Britain appears to have contemplated from the first a war blockade (*e*). But Germany, on December 12, appears to have proposed a pacific blockade, under which the vessels of other Powers would have been turned away but not otherwise penalised. The latter proposal, however, was resisted by the Government of the United States, which adhered to the position previously taken up on the occasion of the blockade of Crete in

(c) This seems evident from the instructions to Vice-Admiral Douglas on December 11, and the accompanying "Instructions for Naval Officers" (B. and F. S. P. 93, 1114-5).

1897, and refused to acquiesce in any extension of the doctrine of pacific blockade which might adversely affect the rights or commerce of States that were not parties to the controversy. In deference to this objection, the project of a pacific blockade was abandoned in favour of an ordinary war blockade. A blockade was thereupon proclaimed of various Venezuelan ports and the mouths of the Orinoco River, to take effect as from December 20, and the requisite notifications to that effect were issued by the allied Powers (*f*). Meanwhile a proposal already made by the United States for a reference of the dispute to arbitration was considered, and ultimately accepted by the Powers; subject to the reservation of certain claims, as to which immediate payment was insisted on. In January, 1903, these terms were provisionally accepted by Venezuela. In the negotiations which followed an attempt was made to bring about an immediate settlement of all outstanding claims, including those of other Powers; but this project was defeated by the insistence on the part of the allied Powers that their claims should be settled in priority to those of other Powers. On February 13, 1903, however, a definite arrangement was come to, and the blockade was thereupon raised. The protocols in which this arrangement was embodied were to the following effect: (1) Venezuela recognised in principle the justice of the claims preferred by each of the blockading Powers. (2) Venezuela also agreed to satisfy immediately certain claims, amounting to about £5,500, on the part of Great Britain, arising out of the seizure of British vessels and maltreatment of British subjects; to make an immediate payment of a similar amount to Germany, on account of a sum of 1,718,815 bolivares (francs), agreed to be due to German subjects; and also to make an immediate payment of a similar amount to Italy in satisfaction of a point of honour, as well as a subsequent payment of 2,810,255 bolivares in respect of other claims. (3) All other claims by the three Powers were to be referred to a mixed commission, subject, however, to an admission of liability by Venezuela, in cases where the claim was for injury to or wrongful seizure of property (*g*). (4) The mixed commission was to consist of one member nominated by

(*f*) *Ibid*, 95, 1126.

(*g*) The only question in such cases, apparently, being whether the injury took place, and if so, what compensation was due.

the complainant Powers, and one by Venezuela, and in case of disagreement an umpire to be nominated by the President of the United States. (5) For the purpose of discharging the claims of the allied Powers, as well as similar claims on the part of other Powers, Venezuela agreed to pay over, as from March 1, 1903, 30 per cent. of the Customs revenue of the ports of La Guayra and Puerto Caballo to the Bank of England branch at Caracas; any further questions arising out of this arrangement being made referable to The Hague tribunal. (6) Venezuela also undertook to make new arrangements with respect to her external debt. (7) All Venezuelan vessels seized by the Powers were to be restored. (8) The blockade was to be raised immediately. (9) Express provision was also made for the renewal and confirmation of certain treaties between Venezuela and two of the Powers that might otherwise have been regarded as having lapsed by reason of the war.

Similar arrangements were also entered into between Venezuela and various other Powers, including the United States, France, Spain and Mexico, so far as related to the reference of their claims to a mixed commission and their right to share in the funds allocated for payment.

By a further protocol between Great Britain and Venezuela it was agreed that the question as to whether the blockading Powers were entitled to preferential or separate treatment in the matter of payment should be submitted to arbitration; it being left to the Emperor of Russia to name from amongst the members of the Permanent Court of Arbitration three persons, not being subjects or citizens of any of the signatory or claimant Powers, to act as arbitrators; each claimant having, however, right to be represented at the arbitration. Protocols to the same effect were entered into with Germany and Italy; and also with other Powers having claims against Venezuela.

The Arbitration and Award.] In the result the Emperor of Russia appointed M. Mouravieff, Secretary of State; Professor Lammasch, of the University of Vienna; and M. de Martens, Privy Councillor, as a Court of Arbitration. By a unanimous award, delivered on February 22, 1904, the Court decided, in effect, that Germany, Great Britain and Italy had a right to preferential treatment for the payment of their claims; and that they were further entitled to prior payment out of the funds

which had been assigned by Venezuela for the discharge of such claims. This conclusion was based (*inter alia*) on the following grounds : (1) That Venezuela, in the protocols of February 13, 1903, had recognised the principle of the justice of the claims preferred by Germany, Great Britain and Italy, whilst in the protocols entered into with other Powers the justice of their claims was not recognised in principle; (2) That prior to the end of January, 1903, Venezuela had not protested against the pretension of the blockading Powers to special security for the satisfaction of their claims, and had, indeed, always drawn a formal distinction between "the allied Powers" and "the neutral or pacific Powers"; (3) That the neutral Powers had not protested against such preferential treatment, either at the moment the war came to an end or immediately afterwards; (4) That the undertaking on the part of Venezuela to offer special guarantees for the discharge of its engagements had been entered into only with the allied Powers; and, finally, (5) That inasmuch as the neutral Powers had taken no part in the war-like operations against Venezuela, they could not be deemed to acquire any direct rights thereunder, even though they might in some respects profit by their results.

Although the dispute in this case did eventuate in war, yet the war was in fact but a minor incident. The proceedings as a whole serve to illustrate the application, in cases of international wrongdoing, both of the older customary and the newer conventional methods of redress falling short of war. Incidentally also they touch on the disputed question of the legality of "pacific blockade"; and serve also to illustrate the introduction into the litigation of States of many of those incidents and principles which attend litigation as between private persons.

The facts disclosed are shortly these: A State is guilty of divers breaches of international duty towards other States. All attempts to procure satisfaction by other methods having proved ineffectual, three of the Powers aggrieved determine to have recourse to forcible measures of redress. These comprise various measures, which, in the wider sense, may be called measures of reprisal, done without declaration or intention of war. A pacific blockade is also proposed by one of the Powers, but relinquished owing to objections raised by another Power. Finally, a war blockade, attended by the ordinary incidents of war, is resorted to. At this stage, however, an amicable adjustment involving reference

of the dispute to arbitration is suggested by a neutral Power, and ultimately agreed to by all parties, subject to certain admissions and to the giving of certain securities for the performance of the award. By the agreement of reference, the offending State, as to certain claims, admits its liability both in fact and principle, and damages are assessed, and provision made for their payment; whilst as to other claims liability is provisionally admitted, but subject to proof of facts (h), and the assessment of damages by minor arbitral bodies. Meanwhile the question of preference which had arisen as between the active claimants, Great Britain, Germany, and Italy, on the one hand, and other claimants, such as France, Belgium, Spain, and Holland, on the other, is referred to the decision of a Court of Arbitration appointed under The Hague Convention of 1899; and in these proceedings the latter States appear as interveners.

In the arbitration which ensued, a preliminary question was raised as to the onus of proof. This question the Court decided, in accordance with the practice in previous arbitrations, in favour of a similar presentation of cases, to be followed by counter cases. On the main question it was argued on behalf of the interveners that to give preference to the blockading Powers would be to put a premium on aggression; whilst on behalf of the active claimants it was argued that to deny such preference, and to allow other creditors to participate in the security which they had succeeded in obtaining at their own risk and expense, would be to rob the diligent creditor of the fruits of his diligence, and put a premium on "standing by". In the result the preference was conceded, for the reasons set out in the award.

Incidentally, the controversy discloses several other interesting features. (1) It had been alleged by Venezuela, by way of counter-claim, that Great Britain was responsible for injuries arising out of the proceedings of the *Ban Righ*, an insurgent gunboat, alleged to have been fitted out in British waters, in violation of the Foreign Enlistment Act. As to this it appears that this vessel had in fact been detained by the British authorities, but had been released on the assurance of the Minister for Colombia that she belonged to that Government, and on the ascertainment from Venezuela that no war existed between the two States. (2) On the question of "blockade", it appears to have been recognised by Great Britain that the establishment of a blockade of the Venezuelan ports created *ipso facto* a state of war between the two countries (i). (3) With respect to the effect of the war on treaties, by a protocol of February 13, 1903, between Great Britain and Venezuela (Art. 7), it was agreed in effect, that inasmuch as it might be contended that the blockade had *ipso facto* created a state of war, and that any treaty existing between the two countries had been thereby abrogated, it should be recorded by an

(h) Including, apparently, the non-existence of circumstances amounting to a justification.

(i) Dispatch, Lord Lansdowne to Sir M. Herbert, January 13, 1903, 96 B. & F. S. P., at p. 481; although treated as open to doubt by the protocol.

exchange of notes that the treaty of amity and commerce of October 29 1834, should be renewed and confirmed (4). Finally, as regard the Monroe doctrine, in reply to an announcement by Great Britain of her intention to resort to forcible measures against Venezuela, Mr. Hay appears to have stated that whilst regretting the use of force by European Powers, against Central and South American countries, the United States Government could not object to such Powers taking steps to obtain redress for injuries suffered by their subjects, provided that no acquisition of territory was contemplated (4). In reply to a similar announcement on the part of Germany, Mr. Hay also quoted the declaration of President Roosevelt in his message of December 3, 1901, that "the Monroe doctrine is a declaration that there must be no territorial aggrandisement by any non-American Power on American soil" but that "we do not guarantee any State against punishment, if it misconducts itself, provided that punishment does not take the form of acquisition of territory on the American continent or the islands adjacent" (4)

Methods of Settling Disputes other than by War.—In the controversies of States war is a last resource, and the experience of nations has devised various methods by which disputes may be adjusted, or a settlement enforced, without recourse to war. Some of these methods are wholly amicable; such are diplomatic negotiation, the appointment of commissions of inquiry, and the acceptance of mediation or arbitration, all of which have been elsewhere considered (m). Other methods, whilst not amicable, yet involve no threat of force; such are the withdrawal from diplomatic communication (n), and the adoption of measures of retorsion. Others, again, although begun without declaration or intention of war, yet involve the use of force to an extent calculated to bring the alleged wrongdoer to his senses, and to constrain him either to agree to a peaceful settlement or to declare war; such are reprisals, and in particular that form of reprisals which takes the shape of embargo, or pacific blockade. Somewhat different, both as regards their occasion and their object, are those proceedings which are resorted to either by a combination of the leading Powers or under their direction, for the purpose of enforcing on some delinquent State measures deemed necessary in the interests of international peace or order. Such proceedings usually take the form of a military or naval demonstration, or a pacific blockade, or military intervention, and may perhaps be regarded as measures of international police.

Retorsion.—Retorsion is a form of retaliation; extending, however, only to measures which, whilst unfriendly, are yet strictly within the

(4) Telegram, Sir M. Herbert to Lord Lansdowne, November 16, 1902, 95 *ibid.* at p. 1084

(4) As to the Monroe doctrine itself, see 11 *ibid.*, p. 4, Wharton, Dig. 1 § 57, Taylor, part II ch. 6; and Wheaton (Dana), 97

(m) See especially, p. 384, *infra*

(n) Taylor, 432

right of the Power adopting them, and which do not afford a cause of war. So, if one State imposes embarrassing restrictions on municipal intercourse, or taxes unduly the imports from another State, the latter may have recourse to analogous measures or to other measures of an unfriendly but non hostile character, for the purpose either of inducing a change of policy or by way of retaliation. So, prior to the war of 1904, when Saghalien belonged wholly to Russia, the latter Power issued regulations, which were quite within her territorial right for the purpose of excluding Japanese fishermen from the waters of Saghalien, whereupon Japan by way of retorsion, threatened to impose differential duties on Russian imports, with the result that the obnoxious regulations were rescinded (o)

Reprisals and Embargo.—The general nature of reprisals, and of an embargo levied by way of reprisal, have already been considered. Reprisals differ from retorsion in so far as they extend beyond the sphere of imperfect rights, and will generally afford a cause of war if the Power against which they are directed is willing and able so to resent them. But at the present time they are commonly resorted to only as against minor Powers and then usually take the form of a temporary occupation of some port or area belonging to the offending State. Even the modern embargo usually takes the form of a provisional detention of vessels belonging to the offending State in its own ports and in this character constitutes an incident of, although it is not otherwise identical with, 'pacific blockade'.

Pacific Blockade: (1) *Its General Character*—A pacific blockade consists in the temporary suspension of the commerce of an offending or recalcitrant State, by the closing of access to its coasts, or some particular part of its coasts, but without recourse to other hostile measures, save in so far as may be necessary to enforce this restriction. In this character the practice is of comparatively recent growth. At bottom, however, it would appear to be merely a special application of the older system of embargo, with the difference that the embargo is now imposed on the vessels of the offending State in its own ports, although the use of the term "blockade" (p) and the false analogy thus set up has occasionally led to the claim to extend its effects to the vessels of other States. It is commonly resorted to in practice, either (1) by way of reprisals and as a method of redress short of war, or (2) as a measure of international police (q).

(1) *As a Method of Redress Short of War*—As a method of redress short of war, pacific blockade has been resorted to in the following instances (*inter alia*). In 1831 France, in reprisal for injuries alleged to have been inflicted on French subjects by Portugal and without

(o) On the subject generally see Hall, 433, Taylor, 434

(p) The term 'pacific blockade' appears to have originated with Haute feuille about 1850

(q) On the subject generally, see Hall, 437, Taylor, 444 and articles by Sir T. E. Holland *Fortnightly Review*, July, 1897, and Westlake L. Q. R. Jan., 1909

any declaration of war, forced the passage of the Tagus, seized a number of Portuguese vessels, and blockaded other ports, until Portugal had agreed to make reparation. In this case the blockade was only enforced against Portuguese vessels, and even these, with the exception of warships, were eventually restored. In 1838 France, again without any declaration of war, instituted a blockade of the ports of Mexico, and also enforced this against the vessels of other States; but in the result war was declared by Mexico, and all vessels previously sequestered were condemned. From 1838 to 1840 Buenos Ayres was blockaded by France, and from 1845 to 1848 by France and Great Britain, in each case without any declaration of war, and without involving other hostilities than those incident to the enforcement of the blockade. In this case also the blockade was enforced against the vessels of other States. In 1850 Great Britain instituted a blockade of Greek ports and laid an embargo on Greek vessels, for the purpose of exacting redress for injuries alleged to have been inflicted on British subjects; but in this case the blockade was confined to Greek vessels. In 1862 Great Britain instituted a similar blockade of Rio de Janeiro and laid an embargo on Brazilian vessels, for the purpose of exacting redress for the plunder of a British ship that had been wrecked on the Brazilian coast. In 1884 France, whilst still purporting to be at peace with China, proclaimed a blockade of a portion of the coast of Formosa, which then belonged to China, proposing to treat British and other vessels as liable to capture and condemnation, whilst at the same time claiming to exercise the privilege of coaling her fleet at Hong Kong; but this pretension was resisted by Great Britain, with the result that France ultimately accepted a state of war. A similar pretension was put forward by France in 1893, when blockading Siam, and with a similar result. In 1902 Germany proposed a pacific blockade of the ports of Venezuela, under which the vessels of other Powers would have been debarred from access, although without incurring the penalty of condemnation; but, in deference to objections of the United States that such a proceeding would prejudice the interests and commerce of other States that were not parties to the controversy, this proposal was abandoned in favour of a war blockade.

(iii) *The Question of its Legality.*—With respect to the legality of pacific blockade, such a question can scarcely arise as between the two Powers at issue, for the reason that the imposition of such a blockade may be treated as an act of war by the State on which it is imposed; and international law has not yet assumed to determine what constitutes a just cause of war. Such a proceeding is, in fact, only resorted to as a method of redress against States greatly inferior in power to the State employing it. It does not, however, appear to be more open to abuse than other methods of redress; for weak States often presume upon their weakness, and the resort to it is now likely to be held in check by international opinion. At the same time, if the blockade should be brought to an end without resulting in war, then

it seems that vessels and property seized ought to be restored; for the reason that the right to condemn is an incident peculiar to war (r). With respect to States that are not parties to the controversy, the legality of pacific blockade would seem to depend on its scope. Any direct interference with the commerce and merchantmen of another State is prohibited, except to belligerents, and as an incident of actual war, which entails certain correlative obligations. If, therefore, under the guise of pacific blockade, and without admission of a state of war and its attendant obligations, it is sought to impose restrictions on the commerce of other States, and more especially if it is sought to enforce such restrictions by capture and condemnation, then such proceeding would appear to be inadmissible (s). But if it be confined to the imposition of an embargo on the vessels of the offending State in its own ports, and more especially if vessels laden with foreign cargo before notification of the blockade are exempted from its operation, then it would seem, in principle at any rate, unobjectionable; for the reason that it involves no direct interference with the commerce of other States, and probably no greater interference, even of an indirect kind, than might be caused by many other acts which are admittedly legitimate. It has, moreover, as we have seen, the sanction of a certain measure of usage (t). Indeed, a recourse to this method of redress is in a proper case even commendable, as being at once more humane and more limited in its scope than actual war (u).

(iv) *As a Measure of International Police.*—In some cases a pacific blockade has been resorted to by European Governments, acting in concert, for the purpose of enforcing on some recalcitrant State measures deemed necessary to international peace and order. Thus, in 1833 Great Britain and France blockaded the coast of the Netherlands, in order to compel that Power to acquiesce in a settlement which had been arrived at by the Great Powers of Europe in 1830, with respect to the independence and neutrality of Belgium. In 1886 a blockade of the coasts of Greece was undertaken by the Great Powers of Europe, other than France, for the purpose of preventing Greece from embarking in a war with Turkey, under circumstances which would have led to the reopening of the Eastern question, and the possible jeopardising of the peace of Europe. In this case the blockade and embargo were applied only to vessels under the Greek flag. In 1897 the Great Powers of Europe, with a similar object, instituted a pacific blockade of the coasts of Crete, which, aided by Greece, was then in a state of insurrection against Turkey, and desirous of union with the former country (a). In this case the vessels and commerce of other Powers

(r) Taylor, 445.

(s) Hall, 440.

(t) Although this often transcends the limits which are here suggested as permissible.

(u) Hall, 441.

(a) In the result Crete was made an autonomous principality, under the suzerainty of Turkey.

were subjected to restriction, in so far as related to the supply of munitions of war and other articles destined for the Greek troops or insurgents. In 1913 the Montenegrin port of Antivari was blockaded by or with the sanction of all the Great Powers of Europe to secure peace in the Balkans. The legality of pacific blockade as a measure of international police would appear to be governed by the same considerations as those applicable in cases where it is resorted to by way of reprisal; although, inasmuch as it is in such cases the result of united action, and undertaken for a common international purpose, it is in fact less open to effectual challenge.

Naval and Military Demonstrations.—Another measure of international police, which is, however, not immediately coercive, takes the shape of a naval or military demonstration, involving such a display of force as is calculated to bring some recalcitrant State to its bearings. This mode of pressure may be resorted to either by several Powers in combination or by a single Power. In 1880 a demonstration of the former kind was resorted to as a means of inducing Turkey to carry out the provisions of the Treaty of Berlin and subsequent conventions, and especially the cession of Dulcigno to Montenegro (b). In 1901 a demonstration of the latter kind was made by France against Turkey; in 1908 by the Netherlands against Venezuela; and on September 1, 1916, by the Allies against Greece.

INTERNATIONAL COURTS OF ARBITRATION AND COMMISSIONS OF INQUIRY

THE RELIGIOUS PROPERTIES ARBITRATION, 1902

[British and Foreign State Papers, vol. 95 (1901-2); and J. B. Moore, *International Arbitrations*, ii. 1348 *et seq.* (c); Scott's *Hague Reports*, p. 1.]

THE "Pious Fund" was a fund originally established by donations made by private persons to the Jesuit Fathers in California for the conversion of the heathen. After the expulsion of the Jesuits in 1767 this fund was administered by the Spanish Government; whilst after Mexico had achieved her independence its administration devolved on the Mexican Government. In 1842 President Santa Anna decreed the sale of the property of the fund and the payment of the proceeds into the Public Treasury, recognising, however, an obligation on the part of the

(b) For other instances, see Taylor, 442.

(c) See also an article by W. L. Penfield (counsel for U. S. A.) in the *North American Review*, clxxv, 834.

State to pay interest, at the rate of 6 per cent., on the capital. Under this decree, property of the value of some \$2,000,000 was disposed of; although the remainder was restored. In 1848, by the Treaty of Guadalupe Hidalgo, the territory of Upper California was acquired by the United States, and thereafter the Mexican Government refused to pay any further interest. In 1868 a convention was entered into between Mexico and the United States for the settlement of all claims which had arisen since 1848 on the part of the citizens of either country against the Government of the other. These claims were to be referred to two commissioners, with power to appoint an umpire in any case in which there might be a difference of opinion. Amongst the matters brought before this commission was a claim by the Bishop of Monterey and the Archbishop of San Francisco against the Mexican Government for the payment over to them of such a proportion of the "Pious Fund" and interest as might be found to be equitably due to Upper California, having regard to the original scope of the endowment. This matter was ultimately referred to the British Minister at Washington, Sir Edward Thornton, as umpire. In the result the umpire found the total value of the fund to be \$1,435,033, and held that the most equitable adjustment would be to divide the whole of the interest into two equal parts, and to award one moiety thereof to the claimants as the share of the Church of Upper California. On this basis the umpire estimated the yearly interest on a moiety of the fund at \$43,050.99, in addition to which he awarded to the claimants a capital sum of \$904,070.79, as arrears of interest for the twenty-one years which had elapsed between February 2, 1848, and February 2, 1869. The latter amount, representing the arrears of interest, appears to have been 'duly paid by the Mexican Government, the last instalment having been paid in 1890 (*d*). But no payment appears to have been made in respect of the annual interest which accrued due after 1869. From 1890 onwards a claim for payment, under this head of the award, was repeatedly made by the representatives of the Roman Catholic clergy of Upper California, and promoted by the Government of the United States. Ultimately, by a convention of May 22, 1902, it was agreed to refer the matter for decision to a Court of Arbitration, instituted under The Hague Convention

(*d*) This was so found by the Court of Arbitration.

of 1899, for the pacific settlement of international disputes. By the terms of the present convention each party was to nominate two arbitrators, not being citizens of the contracting States; and these, again, were to appoint an umpire. The United States appointed Sir Edward Fry, formerly a Lord Justice of Appeal of the English High Court, and Professor De Martens, a Russian jurist; whilst Mexico appointed M. Asser, a member of the Dutch Council of State, and Dr. Lohman, a member of the Dutch Chamber of Deputies; all of them members of the permanent Court of Arbitration established under The Hague Convention. The arbitrators thereupon appointed Dr. Matzen, President of the Danish Landsthing, as umpire.

The questions submitted for decision were :—

(1) Whether the claim of the United States was within the governing principle of *res judicata*, by virtue of the arbitral sentence of November 11, 1875, pronounced by Sir Edward Thornton as umpire; and (2) if not, whether such claim was just.

The tribunal was empowered to render such judgment as might seem just and equitable; and if the decision were against Mexico, then to decide in what currency any sum awarded should be paid.

The Mexican Government, whilst not denying the general applicability of the principle of *res judicata*, nevertheless disputed its applicability in the present case, both (1) on the ground that the arbitrator had exceeded his jurisdiction in making his award; and (2) on the ground, also, that the principle, even if did apply, must be limited to the condemnatory or dispositive portion of the award, and not extended to the law and facts on which it was based, which might have been—and in the present case were alleged to have been—wrongly found. It was also contended that by virtue of the treaty of 1848 and the convention of 1868 the two Governments had intended to settle and cancel all claims on the part of the citizens of either State against the Government of the other, and that the present claim, having arisen on the sequestration of the property prior to the treaty of 1848, must be deemed to have been included therein. Finally, it was contended that the present claim was barred by limitation, inasmuch as the claimants had failed to present it before the Mexican Courts within the period allowed by the local law. In the proceedings before the Court,

French was adopted as the official language, but the counsel and agents of the two Governments were permitted to address the tribunal in the language of their respective countries.

Judgment.] The judgment of the Court, which was delivered on October 14, 1902, was to the following effect :—

“ Considering that all the parts of the judgment or the Decree concerning the points debated in the litigation enlighten and mutually supplement each other, and that they all serve to render precise the meaning and bearing of the ‘dispositif’ (decisory part of the judgment), and to determine the points upon which there is *res judicata*, and which thereafter cannot be put in question ;

“ Considering that this rule applies not only to the judgments of Tribunals created by the State, but equally to arbitral sentences rendered within the limits of the jurisdiction fixed by the ‘compromis’ (e).

“ Considering that this same principle should *a fortiori* be applied to international arbitration ;

“ Considering that . . . there is not only identity of parties to the suit, but also identity of subject-matter [in the two arbitrations] ;

“ Considering . . . that the rules of prescription, belonging exclusively to the domain of civil law, cannot be applied to the present dispute between two States in litigation ;

“ Considering . . . that the silver dollar, having legal currency in Mexico, payment in gold cannot be exacted, except by virtue of an express stipulation ;

“ Considering . . . that, with relation to this point [the currency in which the annual payment should be made], the award of Sir Edward Thornton has not the force of *res judicata*, except for the twenty-one annuities with regard to which the umpire decided that the payment should take place in Mexican gold dollars, because question of the mode of payment does not relate to the basis of the right in litigation, but only to the execution of the sentence ;

(e) The terms of the reference.

“For these reasons the Tribunal of Arbitration decides and unanimously pronounces as follows :—

“(1) That the said claim of the United States of America . . . is governed by the principle of *res judicata* by virtue of the arbitral award of Sir Edward Thornton . . . ;

“(2) That . . . the Government of the Republic of the United Mexican States must pay to the Government of the United States of America the sum of 1,420,682 dol. 67 c. (Mexican) [in extinguishment of the annuity of 43,050 dol. 99 c., due from the 2nd of February, 1869, to the 2nd of February, 1902];

“(3) The Government of the Republic of the United Mexican States shall pay to the Government of the United States of America on the 2nd February, 1903, and in each following year . . . perpetually, the annuity of 43,050 dol. 99 c. (Mexican), in money having legal currency in Mexico” (f).

This case is noteworthy as having been the first case referred for decision to a Court of Arbitration constituted under The Hague Convention of 1899. The award embodies some important rulings as to the application and scope in international law of the principle of *res judicata*; and also as to inapplicability of the principle of prescription to disputes between States. It is conceived, however, that the latter ruling must be confined to claims of the kind then before the Court; and that it was not intended to deny the applicability of prescription as a title, or as a factor in the title, to State territory or property. With respect to the matter submitted for decision, it was held in effect that Sir Edward Thornton had jurisdiction to make the award actually rendered by him: that this award, on the principle that a matter once duly adjudicated cannot be reopened as between the same parties and in the same right (g), was therefore conclusive as to all findings, both in law and in fact, which were necessary to the decision arrived at: but that this principle did not extend to the mode of payment ordered by the original award, for the reason that this was a matter relating not to the basis of the right, but only to the execution of the award; and finally that the claim was not barred by prescription. On these grounds Mexico was ordered to pay the amounts assessed by the judgments, and in Mexican currency. The rendering of this decision, although not important in itself, may be said to mark a new departure both in the progress of international organisation and in the development of international law. .

(f) As originally awarded by Sir Edward Thornton, except as to currency.

(g) The *exceptio rei judicatæ* of Roman law; the estoppel by judgment of English law.

**THE NORTH SEA INCIDENT, 1904: REPORT OF THE
INTERNATIONAL COMMISSION OF INQUIRY**

[British Parliamentary Papers: Russia, No. 2 (1905), and Russia,
No. 3 (1905).]

In October, 1904, during the Russo-Japanese war, the Russian Baltic Squadron, then on its voyage to the East under the command of Admiral Rojdestvensky, encountered on October 21, 1904, at 11.30 p.m., when off the Dogger Bank in the North Sea, a fleet of British fishing steamers from Hull. Alarmed by rumours of the designs of Japanese agents, and fearing a torpedo attack, the Russian squadron opened fire on the British trawlers, thereby sinking one vessel and damaging others, besides killing or wounding several of the fishermen. The Russian fleet then proceeded on its course, without notifying the disaster, until it put into the port of Vigo, in Spain. On these facts coming to the knowledge of the British Government, urgent representations were addressed to the Russian Government, and a demand made both for reparation and for the punishment of those who might be found responsible. The Russian Government expressed its regret, and made promise both of inquiry and compensation; but on being advised by the Russian admiral that his squadron had been attacked whilst passing the British trawlers by two torpedo-boats, it refused to give any pledge that the officers responsible for the occurrence should be punished, holding the injury to be a regrettable but inevitable incident of the attack. British feeling, already aroused by Russian interference with neutral commerce, ran high; the British fleet was mobilised, and war seemed imminent. After some negotiation, however, between the two Governments it was agreed to refer the incident to an "International Commission of Inquiry" under The Hague Convention for the pacific settlement of international disputes (1899, §§ 9-14). By a convention signed at St. Petersburg on November 25, 1904 (*h*), it was provided (*inter alia*) (1) that an international commission should be appointed,

(*h*) Much correspondence took place as to the exact terms of the convention. The convention was expressly stated to be only "analogous" to that contemplated by The Hague Convention, and was expressly made to include questions of responsibility as incident to questions of fact. In the event of conflict it was stipulated that the provisions of the convention itself should be deemed to override those of The Hague Convention. See Parl Papers, Russia, No. 2 [1905], at p. 53.

consisting of five members, one to be nominated by each of the parties, one by each of the Governments of France and the United States of America, and a fifth, to be chosen by the four members so appointed, or in default of agreement, by the Emperor of Austria, together with a legal assessor to be nominated by each of the parties; (2) that the commission should inquire into and report on all the circumstances relating to the incident, and particularly as to the responsibility and degree of blame, if any, attaching to the subjects of either country or any third country; and (3) that the commission should assemble at Paris, and should present its report to the contracting parties signed by all members, its decisions being determined by a majority of votes, and the expenses of inquiry being borne equally by both Governments. The Russian Government also agreed to recall such of its officers as were implicated in or acquainted with the circumstances of the disaster, for the purpose of enabling them to appear before the commission (*i*). The Commission of Inquiry consisted of Admiral Beaumont, Admiral Davis, Admiral Dubassoff (*k*), Admiral Fournier, and Admiral Spaun, together with Sir Edward Fry and Baron Von Taube as legal assessors. The commission commenced its sittings at Paris on December 25, 1904, and presented its report on February 26, 1905. On the part of Great Britain it was contended, in effect: (1) that on the night in question there was, in fact, no torpedo-boat or destroyer amongst the British trawlers, or in the neighbourhood of the Russian fleet; (2) that there was no sufficient justification for opening fire, and that when opened it was not properly controlled or limited; (3) that those on board the Russian ships ought to have rendered assistance to the injured vessels; and, finally, (4) that no hostile act was done by the British trawlers. On the part of Russia it was contended, in effect: (1) that the firing was caused by the approach of two torpedo-boats proceeding towards the squadron; (2) that the fire of the squadron was directed exclusively against the suspicious vessels; and (3) that the Russian squadron did everything in its power to minimise the risks incurred by the fishermen.

(*i*) Meanwhile the affair was also the subject of an inquiry in England, both on the part of a coroner's jury and on the part of the Board of Trade. See *Parl. Papers, The North Sea Incident, October 21-22, 1904*.

(*k*) The representative of Russia originally appointed appears to have been Admiral Kaznakoff.

Report of Commission.] After a prolonged examination the commission presented a report containing an analytical statement of the facts upon which its findings were based. In substance it was found and declared : (1) that, in the opinion of the majority, there were no torpedo-boats or destroyers on the night in question amongst the British fishing fleet ; (2) that, in the opinion of the majority, there was no real justification for opening fire, and that the fire was continued longer than was necessary, although the commissioners were unanimously of opinion that the Russian admiral did, personally, all that he could to prevent the trawlers, recognised as such, from being the object of the fire of the squadron ; (3) that the commissioners unanimously recognised that the Russian admiral was, under the circumstances, justified in proceeding on his way, although it was regretted by the majority that it had not occurred to him, in passing through the Straits of Dover, to inform the authorities of the neighbouring maritime Powers that the firing in the vicinity of the trawlers had left them in need of assistance ; and (4) that the commissioners unanimously recognised that the boats of the British fishing fleet had committed no hostile act. In the result the sum of £65,000 was paid on March 9, 1905, by Russia to Great Britain by way of indemnity (1).

The "International Commission of Inquiry" was introduced by the "Convention relating to the Pacific Settlement of International Dispute" of 1899, and is substantially reproduced, although with a large number of additional regulations with respect to procedure, by the corresponding convention of 1907 (*m*). The incident described throws some light on both its nature and uses. The result of the inquiry may also be said to emphasise the rule that neutrals, whilst they must accept the risks incident to actual hostilities between belligerents, are yet not subject to risks inspired by wholly illusory fears, except at the cost of adequate indemnity.

Aspects of International Organisation.—Both these cases serve to illustrate certain developments in the international organisation of society that came into being as one of the results of The Hague Conference of 1899. The meeting in conference of the representatives of

(1) See also Smith and Sibley, *International Law as interpreted during the Russo-Japanese War*, pp. 446 *et seq.*

(*m*) See Arts. 9-36. The differences between the two conventions are well marked in Whittuck, *International Documents*, pp. 94-99.

the leading Powers, or, as happened in the case of The Hague Conference, of the representatives of the great body of civilised States, for the purpose of declaring the rules by which they, or such of them as are assenting parties, will hold themselves bound, in certain departments of international intercourse, provided the family of nations with a germ of an international law-making body; while the adoption of a habit of co-operation in matters of common concern requiring the appointment of a permanent central bureau exercising a supervision over the conduct of the arrangements agreed upon, furnished the starting-point for a system of international administration, as regards matters of common interest. And in the conventions annexed to the Final Act of The Hague Conference of 1907—including the establishment of the "Permanent Court of Arbitration", the provision made for the appointment of "International Commissions of Inquiry", and the proposal for a Court of Arbitral Justice—we discern the beginnings of an international judiciary. The cases cited are noteworthy mainly as being the first cases in which advantage was taken of this new organisation. The Hague Conferences of 1899 and 1907 not only provided new facilities for arbitration and established new tribunals, together with an approximate scheme of judicial or arbitral procedure; but they also codified certain branches of international law, and paved the way for codification of others. This alone was an achievement of vital importance, for the reason that it tended in some measure to get rid of that uncertainty and want of definiteness which characterise international law and are one of its chief sources of weakness.

The Convention for the Pacific Settlement of International Disputes, 1907.—The convention of 1907 replaced the convention of 1899, as between all Powers expressly adopting it. It was based on, and reproduced largely, the earlier convention (*n*); although it embodies a number of amendments, the more important of which are directed towards providing an optional system of procedure, and thus dispensing with the necessity for the framing of rules of procedure in each particular case. After pledging the signatory Powers generally to use their best efforts to ensure the specific settlement of international differences (Art. 1), it proceeds to deal specifically with the subjects of (i) goods offices and mediation, (ii) international commissions of inquiry, and (iii) international arbitration.

(1) *Good Offices and Mediation.*—The convention embodies an agreement on the part of the contracting Powers, to have recourse to mediation, in cases of serious dispute, before appealing to arms (Art. 2); and also affirms the right of other Powers to offer their good offices, whether before or after the outbreak of hostilities, without this being regarded as unfriendly (Art. 3). At the same time, in default of agreement to the contrary, the acceptance of mediation is not to hamper either side in its preparations for war (Art. 7). Beyond this the

(*n*) Art. 31. See Whittuck, *International Documents*, pp. 92 *et seq.*, where the differences between the two conventions are clearly indicated.

signatory Powers recommend the adoption of a special method of mediation, under which each of the disputants is to choose another Power as mediator; the two mediators thereupon assuming the control of all negotiations for the adjustment of the dispute, to the exclusion of the principals, for a period of thirty days (Art. 8).

(ii) *International Commissions of Inquiry*.—The convention recommends that in disputes on questions of fact, not involving the honour or vital interests of the parties, the latter should institute an international commission, whose duty it will be to inquire into and report on the facts, but whose decision will not possess the character of an arbitral award, and will leave the parties free to act thereon or not as they may think fit (Art. 35). Such commissions are to be constituted by special agreement; the agreement is to define the subject-matter and scope of the inquiry and the powers of the commissioners; the members of the commission being appointed, unless otherwise agreed, in the manner provided for the appointment of arbitrators (Arts. 9 to 12). The convention also embodies a code of rules regulating the procedure to be followed in the prosecution of such inquiries (Arts. 13 to 36).

(iii) *International Arbitration*.—With respect to international arbitration, the convention declares the settlement of disputes between States by judges of their own choice, on the basis of respect for the law, to be the most equitable method of settling disputes in questions of a legal nature, including the interpretation and application of international conventions, and one that the signatory Powers should resort to in so far as circumstances permit; it also puts on record the principle that recourse to arbitration implies an engagement to submit loyally to the award; and reserves to the Powers the right of concluding special agreements with a view to extending compulsory arbitration so far as possible (Arts. 37 to 40). The convention next provides the necessary machinery for the purpose of facilitating recourse to arbitration. This includes the maintenance of the Permanent Court of Arbitration, established by the convention of 1899 (Arts. 41 to 50), and the providing of a new code of arbitral procedure (Arts. 51 to 90).

INTERNATIONAL COURTS OF JUSTICE

THE MAYROMMATIS CONCESSIONS

[1925] P. C. I. J., Series A, No. 2; No. 5; [1927] No. 10.

In May, 1924, the Greek Government filed an application for the hearing by the Permanent Court of International Justice of a dispute between itself and Great Britain, as mandatory of

Palestine, in regard to the claims of Mavrommatis, a Greek subject. It was alleged that, contrary to treaty rights and the terms of the mandate for Palestine, the British Government had refused to recognise to their full extent rights acquired by Mavrommatis under concessions granted by the Turkish authorities in Palestine relating to the construction and working of electric trams, and the supply of electricity and water (1) in Jerusalem, and (2) similar concessions in regard to Jaffa. The Jerusalem contract was entered into prior to October, 1914—the Jaffa concession was of a slightly later date. Apart from plans and surveying work, nothing had been done towards carrying out the contracts when the entry of Turkey into the First World War caused their suspension by mutual agreement until the termination of hostilities. After the conquest of Palestine and the acceptance of the mandate by Great Britain, the mandatory Power granted to a Mr. Rutenberg concessions which conflicted with those granted to Mavrommatis. Negotiations had taken place between the Colonial Office and Mavrommatis, when the latter decided that he was unlikely to obtain satisfaction by further correspondence and invoked the aid of his own Government.

Article 26 of the mandate had provided that the mandatory agreed that if any dispute whatever arose between itself and another member of the League of Nations "relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice". Article 11 of the mandate provided: "The administration of Palestine shall take all necessary measures to safeguard the interests of the community in connection with the development of the country, and, subject to any international obligations accepted by the mandatory, shall have full power to provide for public ownership or control of any of the natural resources of the country or of public works services and utilities established or to be established therein". Under the Peace Treaty of Lausanne, 1923, concessionary contracts entered into between Turkey and the nationals of the other contracting Powers prior to October 29, 1914, were to be maintained, subject to readaptation to changed economic circumstances. States acquiring territory passing from Turkey under the treaty

succeeded to the rights and duties of Turkey as regards such nationals. (Protocol XII, which came into force August 6, 1924.)

On these facts the British Government challenged the jurisdiction of the Court. It denied that there had ever been a dispute with the Greek Government which could not be settled by negotiation; the Greek Government, as opposed to Mavrommatis, had never tried to negotiate—they had merely taken up and filed the application to the Court. It further contended that the dispute was not one concerning article 11 or any article of the mandate—it was a question of the interpretation of part of the Treaty of Lausanne, not of the mandate.

Judgment.] The Court (by a majority of seven to five, Loder, Weiss, Nyholm, Altamira, Anzilotti, Huber and the Greek Judge, *ad hoc*—with Finlay, Moore, Bustamante, Oda and Pessoa dissenting) held that the dispute, though at first a dispute between a private person and the British Government, became a dispute between the mandatory and another member of the League when the Greek Government took up the case. Such negotiations as had taken place must be treated as having failed sufficiently to found the jurisdiction of the Court. The mandatory had granted a concession alleged to be a breach of its international obligations under the Treaty of Lausanne. This made the question whether the administration could withhold from Mavrommatis the readaptation of the Jerusalem concessions a question of the interpretation of article 11 of the mandate, and so within the jurisdiction of the Court. The Jaffa concessions, being later than October 29, 1914, were outside the jurisdiction.

The Court later considered the merits of the case (Series A, No. 5). It held that a clause in Rutenberg's concession allowing expropriation of Mavrommatis, subject to compensation, was contrary to the international obligations of the mandatory. But Rutenberg, owing to the cost of compensation, had in fact renounced his right, and neither expropriation nor annulment of the Mavrommatis concession had taken place, or caused Mavrommatis any loss justifying a claim for compensation.

The Court further held, on an issue presented to it by special agreement, that the concessions had been sufficiently put into effect to entitle Mavrommatis to claim their readaptation under the Treaty of Lausanne.

On May 28, 1927, Mavrommatis, having failed to secure the financial support necessary for carrying out his schemes, the Greek Government presented a claim on his behalf for £217,000 damages for delay by the High Commissioner of Palestine in approving his plans, for non-compliance by the British Government with the judgment of the Court as to readaptation of the concessions, and for the hostility of certain British authorities alleged to have prevented the securing of financial assistance. The British Government replied that there was no provision giving the Court jurisdiction to decide whether the judgment had been complied with or not, nor any other ground giving the Court jurisdiction. The Court held that it had no jurisdiction to decide the case. (Series A, No. 10.)

This case which might also serve to illustrate the general right of a State to support and protect the interests of its nationals abroad (*supra*, p. 202), or in connection with the consideration of the workings of the mandate system (*supra*, p. 219), is included here as an example of a controversy settled by judgment of the Permanent Court of International Justice, set up in pursuance of the Covenant of the League of Nations, which continued in active operation up to the outbreak of the Second World War, and performed much useful work as has been recognised by its replacement in 1946 by a new Court of International Justice functioning under a Statute which, though containing certain alterations, may be not unfairly described as a revision and modification of the Statute and Constitution of the old Court rather than an entirely new departure.

The jurisdiction of the Permanent Court of International Justice rested on mutual agreement between the signatory Powers. But whereas submission to the Court of a dispute might be entirely voluntary, in that prior to its outbreak no arrangement had been come to for the submission of the particular dispute to the Court, in a number of cases by express treaty there existed an obligation to submit disputes of certain kinds to the Court, and by virtue of the so-called Optional Clause of the Statute of the Court (Art. 36), any signatory might declare that he recognised the jurisdiction of the Court as compulsory in certain named classes of disputes. The *Mavrommatis Case* was decided by the Court despite the objection to the jurisdiction raised by the British Government, to be a dispute concerning the interpretation of the Palestine mandate, which Britain had agreed in advance to be subject to the jurisdiction of the Court. The Court adopted a rather extended view of its own jurisdiction, but dealt with the main issues in a judicial manner, and in the third case (Judgment No. 10)

was obliged, without the consent of both parties, to refuse to decide the final claim of the Greek Government which did not relate to the interpretation of the mandate, but was simply a claim for damages for alleged obstruction of the rights of Mavrommatis. In the *Mavrommatis Claims Case*, the Permanent Court of International Justice was called on for the first time to determine the limits of its own jurisdiction. The judgment of the majority, perhaps, shows a natural tendency of a new judicial institution to encourage future recourse to itself by preferring a more extended to a more limited view of its jurisdiction. The view expressed by dissenting Judges, such as Finlay, Moore, and Bustamante, that the dispute really related to interpretation of Protocol XII of the Treaty of Lausanne and not of the mandate seems to the present editor the better view. As Lord Finlay pointed out Article 11 of the mandate dealt with public ownership or control—the Mandatory was to have full power to provide for this, if it did not in so doing violate its international obligations. In granting the Rutenberg concession the Government was not providing for public ownership or control. The violation of an international obligation in the granting of a private contract was not dealt with in the terms of the mandate. The view of the majority appears to amount to saying that the interpretation of any words in the mandate which it might under some circumstances be necessary to explain is a question of interpretation of the mandate.

The discussion of the case on the merits (No. 5) appears to bear out the contention of the minority that the point for decision related to the interpretation of the obligations of Great Britain under Protocol XII of the Treaty of Lausanne, rather than on the interpretation of her duties under the mandate as mandatory of Palestine.

Mavrommatis as a private individual had no right of access to the Permanent Court of International Justice, and it was necessary therefore that the Greek Government in exercise of its undoubted right to act for the protection of its nationals abroad to take up the claim. It would have been well if fuller negotiations between the two Governments had taken place before the filing of the application.

Article 26 of the mandate which gave the Court jurisdiction in this case illustrates one aspect of the mandatory system—the granting to foreign Powers of a right of interference, depending ultimately on treaty right, in all matters covered by the terms of the mandate. In any matter relating to the application or interpretation of the mandate, Greece or any other member of the League of Nations was given the right to bring the mandatory's actions before the Permanent Court for its decision.

In the third *Mavrommatis Case* (No. 10), the Greek Government was unable to rely on any treaty or other agreement conferring jurisdiction on the Court, and could not persuade it to take compulsory jurisdiction in a case not otherwise provided for under the Statute of the Court merely on the allegation of non-compliance with its own previous judgment.

The Permanent Court of International Justice, 1920, and the International Court of Justice of the United Nations.—Up to the conclusion of the First World War, though there was in existence at the Hague the Permanent Court of Arbitration established by the Hague Convention for the Pacific Settlement of International Disputes, the Judges of that Court were not independent international officers holding permanent positions, but were chosen for each dispute as it arose from a panel of names of those who had been elected by the signatories to serve on the Court, if and when required. The Covenant of the League of Nations in 1919 made provision for the setting up of a really permanent International Court. The Court, though connected with the League, particularly through the machinery for the election of Judges, functioned by virtue of its own particular Statute. It was set up at the Hague, and consisted of fifteen Judges (eleven Judges and four deputy Judges) elected by a form of joint election in the Assembly and the Council of the League.

Jurisdiction could be exercised both in cases submitted by mutual agreement after dispute had arisen, and in cases where by prior treaty arrangement the parties had undertaken so to settle it. Further, a large number of States had accepted, either absolutely, or subject to conditions, an obligation contained in what was known as the "Optional Clause" of the Statute of the Court, to submit all disputes falling within certain named categories, which might subsequently arise, for its decision. Moreover, the Assembly or the Council of the League might refer to the Court for its advisory opinion doubtful questions of law arising in the course of problems which were being dealt with.

This Court continued in existence until 1946, rendering a considerable number of judgments and opinions.

It has now been replaced by the International Court of Justice of the United Nations, whose Statute follows very closely that of the Court which it succeeded. The Court is composed of fifteen independent Judges elected regardless of nationality, save that no two may be nationals of the same State and that the electors are directed to bear in mind that the main forms of civilisation and principal legal systems of the world should be represented. They must be either qualified for the highest judicial offices in their country, or be jurists of recognised competence in international law, and are elected by a system of dual election by the General Assembly and the Security Council of the United Nations. The term of office is nine years, but one-third of the Judges retire every three years. No member of the Court may exercise any political, or administrative function or engage in any other occupation of a professional nature, or act as agent, counsel, or advocate in any case. A member of the Court can only be dismissed if in the unanimous opinion of the other members, he has ceased to fulfil the required conditions. The Court enjoys diplomatic privileges and immunities. Provision is made for the choice

of Judges chosen by the parties to sit in cases where those parties have no representative of their nationality on the Court.

The Court is open to States parties to the Statute, and to other States, subject to conditions to be laid down by the Security Council. It has jurisdiction over applications brought by mutual agreement without prior obligations, over those brought in pursuance of prior treaty obligations, and over those brought, as under the Optional Clause of the former Permanent Court, through acceptance in advance of the jurisdiction in four specified categories of legal dispute. Advisory opinions on legal questions may be given as authorised by the Charter of the United Nations. The general outlines of procedure are laid down by the Statute, and will be supplemented by Court orders for the conduct of particular cases, as required. Decisions are by a majority, with a casting vote by the President in the event of an equality of votes. The Court has taken over the seat at the Hague of its predecessor, now dissolved.

RE AUSTRO-GERMAN CUSTOMS REGIME, 1931

[P. C. I. J., Series A/B, No. 41.]

ARTICLE 88 of the Treaty of St. Germain-en-Laye, 1919, provided that "the independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes (without such consent) to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power".

A later protocol of October 4, 1922, in connection with a loan to Austria, contained a further guarantee by Austria that "it will abstain from any negotiations, or from any economic and financial engagement, calculated, directly or indirectly, to compromise this independence. This undertaking shall not prevent Austria from maintaining, subject to the Treaty of St. Germain, her freedom in the matter of customs, tariffs and commercial or financial arrangements, and in all matters relating to her economic regime or her commercial relations, provided always she shall not violate her economic independence by granting to any State a special regime or exclusive advantages calculated to threaten this independence".

In 1931, by a protocol signed at Vienna on March 19, Austria and Germany agreed to negotiations for a treaty to assimilate the tariff and economic policies of their respective countries in accordance with certain principles laid down therein. There was to be a common tariff law and Customs tariff, and no commercial treaties were to be entered into contrary to the provisions of the Customs Union.

The Council of the League of Nations at once requested an advisory opinion from the Permanent Court of International Justice as to whether a regime as laid down by the protocol of March 19, 1931, was compatible with Article 88 of the Treaty of St. Germain and the protocol of October 4, 1922.

Opinion.] By a majority of eight to seven, the opinion of the Court was that the proposed Customs Union was incompatible with the treaty obligations of Austria in question. (The majority consisted of Guenero, Rostworowski, Fromageot, de Bustamante, Altamira, Anzilotti, Unutia and Negulesco—in the minority were Adatei, Kellogg, Rolin-Jacquemyns, Hurst, Schucking, Van Eysinga and Wang.)

This case is given as an illustration of an Advisory Opinion of the Permanent Court of International Justice. It was in fact, of all the Opinions given by the Court, that which at the time came in for the most bitter criticism, it being freely suggested in certain quarters that the majority of the Court, in giving an opinion opposed to German desires, were actuated by political motives rather than deciding the case in an impartial and judicial manner.

In the recorded opinion there is nothing to substantiate such a charge. The Court had indeed a difficult task thrust upon it, for the question submitted to it, though a legal question in that it turned on the interpretation of a treaty, was at the same time a political question of not inconsiderable importance. The meaning of the treaty provisions in question was by no means free from doubt, and the division of opinion shown in the eight to seven decision seems fairly to represent the difficulty of the question submitted. The view taken by the majority, which neither of the representatives of Anglo-American legal ideas shared, is one which could fairly be reached by a quite impartial person. The language of the Treaty of St. Germain-en-Laye safeguarding the independence of Austria used very strong terms—Austria undertook to abstain from any act which might, directly or indirectly, or by any means whatever compromise her independence. A Customs Union with another country much more powerful than itself, in which there existed strong elements anxious to

absorb Austria in Germany, might not unreasonably be regarded as falling within those terms. Nor can it be said, under all the circumstances of the case, that no impartial person could hold that such a Customs Union did not violate the economic independence of Austria by granting to Germany a special regime or exclusive advantages calculated to threaten that independence. The question turned on the details of the particular scheme proposed, which seven of the fifteen Judges appear to have considered legally unobjectionable, but their eight colleagues held to the contrary. Whether one agrees or disagrees with the decision of the majority, it is a decision which can be fairly and impartially reached on the facts and does not on its face support allegations of political bias made by those disappointed by it.

It has been suggested that it is inadvisable to seek the opinion of the International Court on a question involving political issues of this nature, on the ground that the moral authority of the Court may thereby be weakened. On the other hand, the Court was clearly a more detached and impartial body than the Council of the League, and the matter turned on legal as well as political considerations. An international Court like other institutions must sometimes take the risk of rendering unpopular decisions in accordance with law.

APPENDIX

NOTE ON INTERNATIONAL ORGANISATIONS: THE LEAGUE OF NATIONS AND THE UNITED NATIONS

League of Nations.—The First World War of 1914–19 saw the rise of a conviction that the world must never again be allowed to experience the horrors of a general war. It was felt that defective international organisation and differences promoted by want of international understanding had helped to render the general war possible. Hence in the Covenant of the League of Nations, embodied in the Peace Treaty of Versailles, 1919, the contracting parties agreed to establish a new international organisation, the League of Nations. The purpose of the League was to promote international co-operation, and to achieve international peace and security by the acceptance of obligations not to resort to war, by open, just, and honourable relations between nations, by the firm acceptance of international law as the actual rule of conduct among governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations. More than 50 States became members of the League, but its strength was seriously weakened from the outset by the failure of the U. S. A. to ratify the Treaty and become a member. The failure to secure the continued support of either Russia or Germany were added sources of weakness, for the ultimate success or failure of the League as a means of preserving peace clearly depended on the material strength at the command of its members, and on how far those members were genuinely prepared, at possible sacrifices to their own immediate national interests, to act together to uphold the Covenant of the League against violators of its principles.

Three main organs of the League were set up. (1) The Permanent Secretariat, an international civil service, functioning at Geneva, the seat of the League. (2) The Council, which was a fairly small body consisting of the representatives of the principal allied and associated powers, who were permanent members of the Council, and a number of representatives of other member States, originally four only, but subsequently increased to eleven, elected for a period of three years by the Assembly. This Council was to meet at least four times a year, and on such other occasions as circumstances demanded, and provided the most effective directing organ for League activities. (3) The Assembly consisted of representatives of all members of the League, and met once a year ordinarily. As the principle of respect for the sovereignty of the member States by the non-acceptance of majority decisions in most matters of importance was adopted in general by the provisions of the Covenant, the Assembly, as well as the Council, had many important functions

under the Covenant, but from its size it was clearly better adapted as an international parliament for discussion and criticism of matters falling within the province of the League, rather than for prompt and decisive executive action in a time of international crisis.

In both Council and Assembly, except on matters of procedure, the general rule was that decisions must be unanimous.

With regard to matters concerning the preservation of peace—formulation by the Council of plans for the reduction of armaments—a matter to which an exaggerated importance was at the time attached by many of those most zealous for the preservation of peace—was agreed upon, but despite serious attempts made to get the question of general disarmament under way, little progress in that direction was ever made through the organisation of the League.

Members of the League further undertook to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League (Art. 10). Had this article been accepted and carried into effect in accordance with what appeared to be its original intention, the use of force by a foreign State against the territorial integrity or political independence of a member of the League should have been resisted by all other members to the utmost extent of their power, subject to advice given by the Council as to the most effective way of fulfilling the obligation. Failing such intention to give mutual support against aggression by steps going beyond mere talk, such an article should have been deleted from the Covenant both as giving rise to false hopes, and introducing into the organisation of the League a lax standard of interpretation of the obligations undertaken, calculated to serve as a dangerous precedent for international inaction. It was in fact clear from an early stage in the existence of the League, that the member States were not prepared to interpret very strictly their obligations under this article, but the attempt to secure its amendment failed to secure unanimous support.

Any war or threat of war whether League members were immediately affected or not was declared a matter of concern to the whole League, which could thereupon take any action it thought wise to safeguard the peace of the world.

Any dispute between members of the League likely to lead to a rupture was to be submitted either to arbitration, judicial settlement, or inquiry by the Council, and in no case was there to be a resort to war until three months after the rendering of a decision.

In the case of such a dispute submitted to the Council, the members of the League agreed not to resort to war against a State which complied with a unanimous report, but in the case of a report which was not unanimous the members retained their full freedom of action.

All disputes recognised by League members as suitable for submission or judicial settlement which could not be satisfactorily settled by diplomacy were to be submitted to arbitration or judicial settlement.

Awards in such case were to be carried out in good faith, and there was to be no war against a League member who complied with such an award.

Any member resorting to war in disregard to its covenants under the preceding articles (Arts. 12, 13, or 15) was to be deemed *ipso facto* to have committed an act of war against all the other members of the League "which hereby undertake immediately to subject it to the severance of all trade and financial relations, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a member of the League or not". This sanctions clause of the League Covenant should have meant that on a breach by a League member of Arts. 12, 13, or 15, by a resort to war contrary to those agreements, all members of the League at once were to cut off all economic and commercial relations with the covenant-breaking State, and to endeavour to prevent all other States, whether League members or not, from carrying on such intercourse.

There was no obligation to go to war in defence of the Covenant, though it was the duty of the Council to recommend to the Governments concerned, in such a case, what effective military forces should be supplied to protect the covenants of the League. Had the provisions of the Covenant been applied in accordance with their apparent meaning, in the first case in which a major Power openly and beyond all doubt violated the provisions in question—the Italian attack upon Abyssinia in 1935—it is possible that the League might have proved an effective safeguard against a general European war. Instead, however, of an immediate imposition of economic sanctions by all other member States on their own authority, there was a gradual imposition of various economic sanctions after discussion and agreement between the members of the League, which acted as an irritant to Fascist Italy, but which was far too dilatory and incomplete to exercise any decisive effect. Abyssinia was conquered, and the League left to accept the situation resulting from a deliberate and successful flouting of its international obligations by one of the stronger members of the League.

Other articles of the League Covenant dealt with public registration of treaties entered into by members of the League; with advice by the Assembly as to the reconsideration of obsolete treaties; and with the mandates system established under the aegis of the League (*supra*, p. 49).

The League was also concerned with the promotion of fair and humane labour conditions, and various social and economic questions, such as measures against the white slave traffic, opium and dangerous drugs, and the arms traffic in certain territories; prevention and control of disease; and the maintenance of freedom of transit and communications. The activities of League organisations in these social and economic matters formed perhaps the most fruitful branch of League activity.

On the matter of general political co-operation to preserve the peace of the world, however, the League was destined to fail. Members of the League were not prepared to resort to war, if necessary, to protect distant or backward countries, in which they themselves had little interest, from the aggression of their neighbours. The weaknesses shown in the handling of both the Manchurian and the Abyssinian questions led on to the final collapse of the League before the aggression of a revived and powerful Germany. The fault lay not so much in the constitution as in the unwillingness of the members of the League to risk their own national security by engaging in quarrels in which they had no direct concern, other than the general restraint of aggression.

The League officially remained in existence until April, 1946, when its last Assembly took place, and a transfer of its outstanding assets to the new international organisation of the United Nations was effected.

United Nations Organisation.—The organisation known as the United Nations came into being in 1945 under the Charter of the United Nations, signed at San Francisco on June 26, 1945, as the result of a conference attended by representatives of 50 States, which took as its basis proposals previously drafted at Dumbarton Oaks (o).

The Charter asserts in a general preamble the determination of the signatories to save succeeding generations from the scourge of war; to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women, and of nations large and small; to establish conditions under which justice and respect for treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom; by the practice of tolerance, living in peace as good neighbours, uniting their strength to maintain peace, by ensuring that armed force shall only be used in the common interest, and by employing international machinery for the promotion of the economic and social advancement of all peoples. It then goes on to provide for the establishment of an international organisation to be known as the United Nations, whose purposes are: (1) The maintenance of international peace and security by taking effective collective measures against threats to the peace and acts of aggression, and by promoting peaceful settlement of disputes or situations endangering peace. (2) The development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. (3) International co-operation in economic, social, cultural and humanitarian problems. (4) Formation of a centre for harmonising the actions of nations in the attainment of these common ends.

The organisation and its members are to act in accordance with six general principles. (1) The sovereign equality of all its members. (2) Fulfilment in good faith of the obligations assumed under the

Charter. (3) Settlement of their disputes by peaceful means. (4) Abstention from threats or use of force against the territorial integrity or political independence of any State, or actions in any other manner inconsistent with the purposes of the United Nations. (5) Members are to give the United Nations every assistance in action taken by it in accordance with the Charter, and are to give no assistance to States against which preventive or enforcement action is being taken.

The organisation is to ensure that even non-member States act in accordance with its principles, so far as may be necessary for the maintenance of international peace and security, but is not authorised to intervene in matters essentially within the domestic jurisdiction of any State.

Apart from the original signatories, membership in the United Nations is open to all other peace-loving States which accept the obligations and which are considered by the organisation able and willing to carry them out—admission of such States being by decision of the Assembly on recommendation of the Security Council.

Members against whom preventive or enforcement action has been taken by the Security Council may be suspended from exercise of rights of membership by the Assembly on recommendation of the Security Council, but the suspension may be terminated by the Security Council. A member persistently violating the principles of the Charter may be expelled by the Assembly on the recommendation of the Security Council.

The chief organs of the United Nations are a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice, and a Secretariat.

The General Assembly consists of all the members, each having not more than five representatives. The General Assembly may discuss any matter within the scope of the Charter, and unless the Security Council is already dealing with the matter under the Charter, may, and if that Council does not request its opinion, make recommendations to the Council or to member States on such matters. Disputes or situations likely to cause international friction may be brought before the Assembly, as well as before the Council, and, here again, unless the matter is in the hands of the Council, recommendations may be made.

The Assembly may further call the attention of the Security Council to situations likely to endanger peace and security. It is to initiate studies and make recommendations for promoting international co-operation in the political, economic, social, cultural, educational, health and legal fields. It may receive and consider reports both from the Security Council and other organs of the United Nations, and it is under its authority and subject to its general control that the Trusteeship Council, whose work replaces that of the Permanent Mandates Commission of the League of Nations, carries out its functions.

It further considers and approves the budgetary or financial arrangements of the United Nations. Each member has one vote, and decisions on important questions, such as maintenance of peace, elections to the Security, Economic and Social, and Trusteeship Councils, admission, suspension or expulsion of members, operation of the trusteeship system and budgetary questions, must be by a two-thirds majority of the members present and voting. Other questions can be decided by a simple majority. Members two years in arrears with their contributions to the organisation are in general debarred from voting.

The General Assembly meets in regular annual sessions, and in such special sessions as may be required.

The Security Council consists of eleven members of the United Nations; China, France, the U. S. S. R., the United Kingdom, and the U. S. A., having permanent seats, and six other members being elected by the General Assembly for a term of two years, three of whom retire each year, and are not immediately eligible for re-election. One representative only of each member attends the Security Council meetings.

On the Security Council falls the primary responsibility for the maintenance of peace and security, and members agree to accept and carry out its decisions in accordance with the Charter.

It is to present annual, and if necessary, special reports to the General Assembly. It is to be so organised as to be able to function continuously, each member of the Council having a permanent representative at the seat of the organisation.

Decisions of the Security Council require an affirmative vote of seven members, *including the concurring votes of the permanent members*, except that parties to a dispute before the Council, under Chapter VI or paragraph 3 of Article 52, are to abstain from voting. On matters of procedure for a decision a vote of any seven members is sufficient. When the Security Council considers the interests of any member of the United Nations are specially affected by a question before it, that member may take part in the discussion without vote—if non-members' interests are affected the Security Council may also admit the State affected to participate on such terms as it thinks just.

Eighteen articles of the Charter (Arts. 33-51, Chapters VI and VII) deal with pacific settlement of disputes and action in respect to acts of aggression and treaties to and breaches of the peace.

The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, are in the first place to seek a solution by any form of peaceful (Art. 33) means of their own choice. When it deems it necessary, the Security Council is to call on the parties so to settle their dispute. The Security Council may further investigate any dispute or any situation which might lead to friction or give rise to a dispute, to determine if there is any danger to the maintenance of peace and security. Such disputes or situations may be brought by any member, or even in certain cases

by a non-member party to a dispute, accepting the obligations of the Charter, to the attention of the Security Council or the General Assembly.

The Security Council may recommend to the parties any particular method of adjustment it thinks fit.

If the parties fail to reach a settlement by such peaceful means, they are to refer to the Security Council, which may either recommend terms of settlement itself or suggest some new method of settlement. At the request of all the parties, the Security Council can make direct recommendations for settlement in the first instance, without recourse to other means of settlement.

If it is alleged that there exists a threat to the peace, or there has been a breach of the peace, or act of aggression, the Security Council is to decide whether this is the case, and if so what measures shall be taken to maintain or restore peace. It may, before reaching a final decision, or making definite recommendations, call on the parties concerned to take such provisional measures as it deems desirable for the maintenance of peace.

The Security Council may decide what measures not involving the use of armed force are to be used to support its decisions, and may call on the members of the United Nations to apply such measures. If it thinks that such measures have proved to be, or would be, inadequate, it may take such military action by air, sea, or land forces as may be necessary to maintain or restore peace; all members of the United Nations having undertaken to enter into special agreements rendering available armed forces, facilities, and assistance, to the extent therein provided, to the Security Council, at its call. States whose forces are to be used may, however, participate in the decisions of the Security Council as to their employment. Special national air force contingents for combined international enforcement action are to be held immediately available for urgent military measures, but the general plans for the application of armed force are to be made by the Security Council with the assistance of a military staff committee, consisting of the chiefs of staff of the permanent members of the Security Council, acting as advisers to that Council.

The Security Council having made its decision, the action required to carry out that decision is in the hands of the States called on to take preventive or enforcing action, but all the members, whether participating directly in military measures or not, are to join in affording mutual assistance in carrying out the measures decided upon.

If any member claims that enforcement action confronts it with special economic difficulties, it may consult the Security Council as to the solution of those problems.

In the case of an armed attack on a member, no member need await the decisions of the Security Council before exercising the right of individual or collective self-defence, but any measures taken should be immediately reported to the Security Council.

Chapter VIII of the Charter safeguards the validity of regional

arrangements for matters relating to peace and security which are consistent with the purposes and principles of the United Nations.

Chapters IX and X deal with international economic and social co-operation, and the department of the United Nations established to deal with such questions. There is set up an Economic and Social Council, consisting of eighteen members of the United Nations elected by the General Assembly for a term of three years, six members retiring annually, but being eligible for immediate re-election. This carries out the functions covered by the general purposes and principles of the Charter, under the general supervision of the Assembly.

In Chapters XI-XIII of the Charter the former mandates system under the League of Nations is replaced by what is now called an international trusteeship system under the direction of a Trusteeship Council (see p. 51, *supra*).

Under Chapter IV the Permanent Court of International Justice at the Hague is replaced by a new international Court of justice, which is the principal judicial organ of the United Nations (see p. 398, *supra*).

The Secretariat consists of a secretary-general, appointed by the General Assembly on the recommendation of the Security Council, and a staff appointed by him under regulations established by the Assembly. The Secretariat are international officials responsible only to the organisation, and are not to seek or receive instructions from any Government or authority outside the organisation. The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security. He is to make an annual report to the General Assembly on the work of the organisation.

Treaties entered into by members are to be registered with the Secretariat, and treaties not so registered may not be invoked before any organ of the United Nations. In the case of conflict between the obligations of a member under the Charter, and under any other international obligation, the obligations under the Charter prevail.

The organisation is to enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes, and representatives of the members and officials of the organisation, are to have such privileges and immunities as are necessary for the independent exercise of their functions.

For amendment of the Charter a two-thirds majority vote in the Assembly ratified by two-thirds of the members of the United Nations, including all the permanent members of the Security Council, is required, and provision has been also made for the holding at a future date of a general conference for the purpose of reviewing the working of the Charter.

The headquarters of the organisation is located in the United States of America, being at present in temporary quarters not far from New York.

The new organisation thus differs in some important respects from

the League of Nations. The maintenance of peace and security is given increased emphasis and wider powers are entrusted to the Security Council than to the former Council of the League. The obligations of the members are in some respects less specific—the measures to be taken in event of aggression or threat to the peace being left to the Powers immediately concerned, or to the action of the Security Council, which has not merely authority to impose economic sanctions, but which is to have at its call armed forces of the member States. The removal of the principle of unanimity in decisions of Assembly or Council has decreased the possibilities of obstruction. It is, however, possible for any one of the permanent members of the Security Council to block effective action by that body—the concurrence of those members being required for decisions by the Council, except on procedural questions and decisions under Chapter VI, and paragraph 3 of Article 52 concerning settlement of disputes. There are in the Charter no territorial guarantees or automatic sanctions—the general machinery being made rather more elastic than under the Covenant of the League. Less respect seems to have been paid to the theory of the equality of all States than to the fact that in action in restraint of aggression the main burden would probably fall on the permanent members of the Security Council. While therefore the general structure of the United Nations is not dissimilar from that of the League of Nations, advantage has been taken of experience gained to eliminate what had appeared to be weak points in that organisation.

Organisation, however, is not enough to ensure international peace and security, nor will mere improvements in detail in the machinery set up for the promotion of peace entirely remove the risk of war.

The successful working of the United Nations, or of any other international organisation, must depend primarily on the spirit in which the work is carried on. Co-operation between the members, and particularly between the permanent members of the Security Council, is an important factor. Some indeed regard this as the most important factor, and view with despair any situation in which there may be a complete break between the chief permanent members of the Council. It would be unfortunate if that view generally prevailed. It would be fatal to the prospects of the United Nations if regard for an outward appearance of agreement, which was in reality a hollow sham, should lead to compromises which involve disloyalties to those high principles proclaimed by the Charter as its objects and its purposes. International conferences and organisations have in general a bias towards compromise. Compromise based on fear, masquerading as wisdom based on peacefulness, is not a road along which we can hope to find either peace or security. Loyalty to the principles of the Charter is of greater consequence than the preservation of the forms of unity. If the members of the organisation remain loyal to the principles and purposes proclaimed in the Charter, the United Nations, through all the international difficulties which lie ahead, can become, and can remain, a powerful factor in the preservation of the peace of the world.

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